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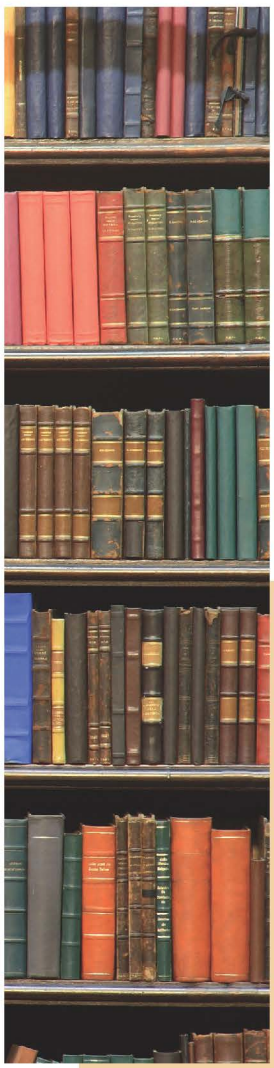
POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

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CROSS-BORDER ACTIVITIES IN THE EU - MAKING LIFE EASIER FOR CITIZENS
Session I

Workshop for the JURI Committee

EN

2015

EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Cross-border activities in the EU
Making life easier for citizens

Workshop for the JURI Committee

Session I

PE 510.003 EN

This workshop was requested by the European Parliament's Committee on Legal Affairs.

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CIVIL LAW AND JUSTICE FORUM
with the participation of National Parliaments[1]

"Cross-border activities in the EU - Making life easier for citizens"

DRAFT PROGRAMME

Thursday, 26 February 2015
09:30 - 12:30 and 14:30 - 18:30

Brussels
Room ASP 5 G 3 -European Parliament, Brussels

09:30 - 10:00 **OPENING**	
09:30 - 09:40	**Welcome and opening remarks**: **What is it all about?** Pavel Svoboda, Chair of the Committee on Legal Affairs
09:40 - 09:50	**Using EU private international law to facilitate the free movement of citizens** R.L. Valcarcel Siso, Vice-President in charge of relations with national parliaments
09:50 - 10:00	**The Latvian Council Presidency -agenda for the area of civil law** Inese Libina-Egnere, Vice speaker of the Saeima and Vice chair of the Legal affairs committee

10:00 - 12:30 **SESSION I** **LESS PAPER WORK FOR MOBILE CITIZENS**	
10:00 - 10:10	**Opening remarks: Towards a European Code on Private International Law?**

[1] With the support of the Directorate for relations with National Parliaments - Legislative Dialogue Unit

Prof. Giesela Rühl, Jena University, and Prof. Jan von Hein, Freiburg University

10:10 - 10:30 **Promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU and beyond (Proposal for Regulation, COM(2013) 228)**

Prof. Pierre Callé, Paris Sud University (Paris XI)
Michael P. Clancy, Solicitor, United Kingdom (The Law Society of Scotland)

10:30 - 11:00 **Debate,** opened by Mady Delvaux, MEP, rapporteur for the public documents proposal

11:00 - 11:15 **Coffee break**

11:15 - 11:25 **Towards European Model Contracts for Succession and Family Law?**

Prof. Christiane Wendehorst, Vienna University

11:25 - 11.45 **EU Regulation 650/2012 on successions and on the creation of a European Certificate of Succession**

Kurt Lechner, Notary Chamber of Palatinate, Germany
Eve Põtter LL.M, Legal advisor of the Estonian Chamber of Notaries

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CROSS BORDER FAMILIES AND FAMILIES CROSSING-BORDERS

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Mairead McGuinness, Vice-President, European Parliament Mediator for parental child abduction,

14:40 - 14:50 **Presentation of study: "Cross-border parental child abduction in the EU"**

Dr Ilaria Pretelli, Swiss Institute of Comparative Law, Lausanne

14:50 - 15:00 **Mediating International Child Abduction Cases**

Spiros Livadopoulos, Lawyer and Mediator, European Cross-border Family Mediators' Network

15:00 - 15:30 **The Brussels IIa Regulation: towards a review?**

Hans van Loon, The Hague, Member of *Institut de Droit International,*

Former Secretary General of the Hague Conference on Private International Law

Michael Shotter, Head of Unit on Civil Justice Policy, DG Justice
European Commission

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16:00 - 16:10 **Name Law - is there a need to legislate?**

Prof. Paul Lagarde, Université Paris I (Panthéon-Sorbonne)

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Dr Harm Schepel, Professor of Economic Law, Brussels School of International Studies, University of Kent at Brussels

16:40 - 16:50 **The European Small Claims Procedure and the new Commission proposal**

Dr Pablo Cortés, University of Leicester

16:50 - 17:20 **Debate,** opened by Lidia Geringer de Oedenberg, MEP, rapporteur for the review of the Small Claims regulation

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Prof. Giuseppe De Palo ADR Center Srl

17:30 - 17:40 **The 2005 Hague Convention on Choice of Court Agreements and the recast of the Brussels I Regulation**

Dr Gottfried Musger, judge at the Austrian Supreme Court (OGH)

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18:20 - 18:30 **Conclusions**

Pavel Svoboda, Chair of the Committee on Legal Affairs

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Session I - Less paper work for mobile citizens

Towards a European Code on Private International Law?

Jan von Hein and Giesela Rühl

Upon request of the JURI Committee, this study provides an analysis of the current state of European Private International Law (PIL). It describes the deficiencies of the law as it stands at the moment and discusses whether they can be overcome with the help of a (complete, sectoral or partial) codification of the pertaining rules and regulations. It concludes that the time for a comprehensive European Code on PIL has not yet come and that a "creeping" codification is to be preferred. The study suggests that a process consisting of three pillars should be developed in order to gradually create a more coherent legislative and institutional framework for European PIL that will facilitate and foster cross-border trade and life.

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EXECUTIVE SUMMARY

Background

One of the most important dates in the history of European Private International Law is 2 October 1997. On that day the Member States of the European Union signed the Treaty of Amsterdam – and endowed the European legislature with near to full competences in the field of Private International Law. What followed was a firework of legislative actions leading to the adoption of no less than 15 Regulations on various aspects of choice of law and international civil procedure. The fact that the pertinent legal rules are scattered across various legal instruments that do not add up to a comprehensive, concise and coherent body of rules, however, gives rise to a number of concerns. Therefore, the European Commission as well as the European Parliament have called for a discussion on the future of European Private International Law in general and the merits and demerits of a European Code on Private International Law in particular. Commissioned by the Committee on Legal Affairs of the European Parliament, the following study seeks to contribute to this debate.

Aims

The study pursues four aims:

- first, to analyse the current state of European Private International Law (PIL), in particular its perceived deficiencies (infra 0.).
- second, to describe possible courses of action to overcome these deficiencies, including a European Code on PIL (infra 0.)
- third, to analyse the merits and demerits of possible courses of action, including the adoption of a European Code on PIL (infra 0.)
- fourth, to suggest a course of action that will gradually lead to a more coherent legislative framework for European PIL (infra 0.).

GENERAL INFORMATION

KEY FINDINGS

- European PIL as it currently stands is not codified in single instrument. It is not even embodied in a single type of instrument. Instead, it is scattered across various instruments of a different legal nature, including EU Regulations, EU Directives and international conventions (see infra 1.).
- European PIL as it currently stands suffers from various deficiencies. As the result of the multitude of legal sources, it is characterized by gaps, redundancies and incoherences. It follows that European PIL in its present state does not exhaust all possibilities to facilitate and foster cross-border trade and life (see infra 0.)
- To overcome the deficiencies of European PIL, various courses of actions have been proposed. These range from a comprehensive codification to (more) sectoral codifications to the codification of general principles of European PIL (see infra 3.).
- Each of these courses of action has a number of advantages (see infra 0.). A comprehensive codification, for example, would yield significant gains with regard to the visibility, accessibility and coherence of European PIL (see infra 2.). The same is true, albeit to a lesser degree, for sectoral codifications and for the codification of general principles of European PIL (see infra 0 und 0.).
- However, there are institutional and practical obstacles that cast the actual feasibility of a comprehensive codification of European PIL into doubt (see infra 0.). The same holds true for the codification of general principles of European PIL (see infra 0.). It follows that, for the time being, the only realistic way forward is the adoption of (more) sectoral codifications limited to specific legal areas of PIL. However, these sectoral codifications should be accompanied by measures designed to ensure the coherence of European PIL in the long term.
- To overcome the deficiencies of the current legal framework and avoid the current obstacles to larger codification projects we propose deploying a three-pillar-model of legislative measures that will gradually lead to an improved legal and institutional framework for European PIL, which may in turn pave the way for a comprehensive European Code on PIL in the long term (see infra 0.).

1. INTRODUCTION

The internal market and the EU as an area of freedom, security and justice are based on the notion that, in principle, persons, capital and goods may cross the borders between Member States without undue restrictions. As a result of such cross-border activity, cases frequently involve an international element: a professional established in France may sell goods via the internet to a consumer habitually resident in Belgium; German businessmen may set up a private limited company in England, but operate it afterwards from their German center of administration; a Luxembourg national may acquire property in Italy and die intestate shortly afterwards. In all these cases a number of questions arise. Which state's courts are competent to decide a dispute? Which state's law applies to the substance of the dispute? How can judgments rendered in one state be recognised and enforced in another? The field of law that provides answers to these three questions is commonly referred to as Private International Law (abbreviated as PIL). It falls into two distinct subjects: choice of law or conflict of laws in the narrow sense (dealing with the applicable law, i.e. the second of the questions listed above)[1] and international civil procedure (dealing with jurisdiction, recognition and enforcement, i.e. the first and third of the questions listed above).

In the 20th century, most PIL rules were to be found in national law. This caused a number of widely acknowledged disadvantages, one of them being a lack of international harmony of decisions and, as a result, legal uncertainty. The last 50 years have therefore witnessed increasing efforts to internationalize and most importantly to Europeanize the field.[2] However, as the Community's founding treaties did not endow European law-makers with a specific legislative competence in the area of PIL, Member States were compelled to pursue this goal in the form of conventional international treaties.[3] As a consequence, Europeanization was achieved only in a fragmented fashion and was limited to rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters[4] as well as rules on the determination of the applicable law to contractual obligations.[5] Only at the end of the 1990s did the Member States confer upon the European legislature a specific competence as regards PIL[6] – and in so doing laid the groundwork for an unprecedented series of legislative measures that have in just over ten years created an expanding body of European PIL.

This development has generally been approved of both in academia and in practice. PIL can more effectively overcome the legal uncertainty associated with cross-border transactions if it is international and not domestic in nature.[7] However, the Europeanization of PIL also causes problems: the newly emerged field is currently embodied in no less than 15 Regulations covering topics in civil and commercial matters as well as family and succession matters (see infra 1.). And even though this number is impressive and the overall quality of the various Regulations is generally considered good,[8] the fact that the pertinent legal rules are scattered across various legal instruments gives rise to concerns.

- First, the current Regulations do not add up to a comprehensive set of PIL rules, but contain various gaps in their substantive scope that make it necessary to rely on other sources of European law (e.g. Directives or the freedoms of the TFEU), international conventions or, not least, domestic PIL rules (see infra 0.). The resulting patchwork of applicable PIL rules may create frictions and endanger legal certainty by making this area of law rather intransparent and unduly difficult to access for legal

[1] Note that, at times, the notion of private international is restricted to refer to choice of law only. *Van Calster*, European PIL, p. 1 calls this "[t]he classic, narrow view of PIL"; in domestic usage, e.g., in Germany, PIL ("Internationales Privatrecht") is occasionally defined as encompassing *only* this specific meaning, see the legal definition in Art. 3 of the Introductory Act to the German Civil Code (EGBGB). In the following study, we will use the term PIL in the broad sense except where otherwise indicated.

[2] See for a detailed account *Kreuzer*, RabelsZ 70 (2006) 1 et seqq.

[3] See for a detailed account *Kreuzer*, RabelsZ 70 (2006) 1, 9 et seqq.

[4] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 [1972] OJ L 299/32, consolidated version [1998] OJ C 27/1.

[5] Convention on the Law Applicable to Contractual Obligations of 19 June 1980 [1980] OJ L 266/1, consolidated version [1998] OJ C 27/34.

[6] Art. 61(c) in conjunction with Art. 65(b) of the Treaty of Amsterdam (today: Art. 81(1) and (2)(c) of the Treaty of Lisbon). See *Basedow*, C.M.L.Rev. 37 (2000) 687 et seqq.

[7] See for a detailed account *Rühl*, Statut und Effizienz, 2011, pp. 39 et seqq., 77 et seqq.; *Rühl*, J. Priv. Int. L. 6 (2010) 59, 79 et seqq., 90 et seq.

[8] For generally favourable appreciations of the various regulations, see *Bogdan*, Introduction, pp. 31 et seqq.; *Van Calster*, European PIL, pp. 19 et seqq.

practitioners (see infra 0.).

- Second, PIL as a body of law is not restricted to specific rules that are only relevant for certain legal relationships (such as rules on the law applicable to contracts, torts, or divorce). Rather it contains a general part consisting of legal principles and figures that affect the determination of the law applicable to various legal relationships (see infra 2.2.1.3.). Such general principles concern issues such as *renvoi*, public policy or dealing with references to the law of states comprising more than one system of private law (see infra 0.). Because of the fragmented way in which European PIL is regulated at the moment, each Regulation contains its own specific rules on such general principles, thus leading to a certain degree of redundancy (see infra 0.). Moreover, some important questions – such as the impact of dual nationality when citizenship is used as a connecting factor – are not answered by the EU Regulations, thus leading again to gaps that must be filled by other legal sources (see infra 0.).
- Third and finally, scattering functionally interrelated rules across various Regulations may endanger their coherent interpretation and application in practice (see infra 0.). This concern is particularly relevant with regard to the functional interdependence between the three different parts of PIL mentioned above, namely jurisdiction, choice of law as well as recognition and enforcement. Although connecting factors used for jurisdictional purposes, on the one hand, and for determining the applicable law, on the other, do not always have to be aligned in a parallel fashion because of their different functions and context, unnecessary and avoidable contradictions or frictions between those areas of law may lead to legal insecurity and increasing costs because of a frequent application of foreign substantive laws in other Member States' courts (see infra 0.). The European legislature has already taken into account the need to harmonize approaches to choice of law, on the one hand, and to international civil procedure, on the other, by enacting Regulations that combine both aspects of PIL in a single legal instrument, such as the Succession Regulation.[1] The question is whether this integrated method could (or should) be used in other areas of PIL as well (e.g. in the PIL of obligations or matrimonial matters, see infra 0.) or even serve as a blueprint for a comprehensive codification of PIL (see infra 3.).

The aforementioned concerns have triggered a lively debate about the necessity and/or desirability of creating a comprehensive "European Code on PIL", both in the political arena and in academia. As early as 2010, the European Parliament expressed its hope that "the final aim [of the European legislative process] might be a comprehensive codification of PIL".[2] On 11 March 2014, the European Commission stated in its Justice Agenda for 2020: "Codification of existing laws and practices can facilitate the knowledge, understanding and the use of legislation, the enhancement of mutual trust as well as consistency and legal certainty while contributing to simplification and the cutting of red tape. In a number of cases, the codification of certain parts of the existing EU legislation relating to justice or to relevant case-law of the Court of Justice of the Union in the area of justice can be beneficial in terms of providing consistency of legislation and clarity for the citizens and users of the law in general […]. Since 2000, the EU has adopted a significant number of rules in civil and commercial matters *as well as on conflict of laws. The EU should examine whether codification of the existing instruments could be useful, notably in the area of conflict of laws [...].*"[3]

These political statements have been foreshadowed and accompanied by an academic discussion on the feasibility and the desirability of a codification of European PIL. In 2012 the European Parliament's Committee on Legal Affairs requested a study on this issue from the T.M.C.-Asser-Institute in The Hague (Netherlands), where a working group led by Professor Dr. Xandra Kramer (Erasmus University, Rotterdam) was set up.[4] The

[1] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 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] OJ L 201/107.

[2] European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2009/2140(INI), P7_TA(2010)0304), at No. 1.

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final, p. 9, at No. 4.2 [emphasis added].

[4] One co-author of the present study, *Jan von Hein*, participated in the deliberations of this working group as an external advisor.

results reached by this working group were presented in October 2012.[1] Moreover, the "European Added Value Unit", a part of the European Parliamentary Research Service, published a study in 2013 that attempted to estimate the costs caused by the current fragmentation of legal sources of European PIL.[2] Apart from these requested studies, questions of codifying European PIL – either as a whole or at least with regard to general principles (see infra 3. and 0.) – have been analyzed by many European scholars.[3] Following a conference on this subject that had been held in Toulouse (France) in March 2011,[4] *Paul Lagarde* presented a proposal for a codification of selected issues relating to the general part of European PIL.[5] In June 2012, a conference was held at the University of Bayreuth (Germany) that dealt with the question as to whether general principles of European PIL should be extracted from the current Regulations and be codified in a separate "Rome 0"-Regulation.[6] In October 2014, the authors of the present study hosted a conference at the University of Freiburg (Germany) on the "Coherence in European Private International Law", which addressedvarious issues of codification and/or a consistent interpretation of European PIL that are also of relevance to this paper.[7] In addition, the work of the European Group of Private International Law (Groupe Européen de Droit International Privé – GEDIP) must be mentioned,[8] which has, inter alia, recently presented a proposal on dual nationality.[9] Finally, the German Council for Private International Law[10] has elaborated various proposals to fill the gaps in the existing framework of European PIL, e.g. violations of personality rights,[11] prospectus liability,[12] the effects of an assignment of claims on third parties[13] and international company law.[14]

The present study aims to contribute to the debate about the future of European PIL. It sets out to examine possible ways to a codification of European PIL and to evaluate their respective merits and demerits. It is organized in four parts:

- In the first part (infra 0.), we provide a brief overview of the current state of play of European PIL. More specifically, we provide a concise survey of the numerous legal sources, their substantive content and their characteristic features (see infra 1.). By the same token, we analyze the above-mentioned deficiencies of European PIL in more detail (see infra 0.).
- In the second and third part (infra 0. and 0.), we describe, analyse and evaluate possible courses of action, ranging from (1) a comprehensive codification of European PIL (see infra 3. and 4.) to (2) a further, more closely integrated codification of various sectors (see infra 0. and 0.) to (3) a codification of general principles of European PIL (see infra 0. and 0.).

[1] *Kramer et al*., A European Framework for PIL, 2012 (PE 462.487).
[2] *Ballester*, Cost of Non-Europe Report, 2013.
[3] *Czepelak,* Eur. Rev. Priv. L. 2010, 705 et seq.; *Jayme*, in: Leible/Unberath (eds.), Rom 0-Verordnung, 2013, p. 33 et seq.; *Kieninger*, in: FS von Hoffmann, 2011, pp. 184 et seqq.; *Kreuzer*, in: Jud/Rechberger/Reichelt (eds.), Kollisionsrecht in der Europäischen Union, 2008, p. 1 et seq.; *Siehr*, in: Jud/Rechberger/Reichelt (eds.), Kollisionsrecht in der Europäischen Union, 2008, p. 77 et seq.; on the problem of codifying general principles of European PIL see *Heinze*, in: FS Kropholler, 2008, pp. 105 et seqq.; *Nehne*, Methodik, 2012; *Sonnenberger*, in: FS Kropholler, 2008, p. 227 et seq.; *id*., IPRax 2011, 325 et seq.
[4] *Fallon/Lagarde/Poillot-Peruzzetto* (eds.), Quelle architecture, 2011; on this conference, see the report by *Kohler,* IPRax 2011, 419 et seqq.
[5] Published with an introduction by *Basedow* in RabelsZ 75 (2011) 671 et seqq.
[6] Leible/Unberath (eds.), Rom 0-Verordnung, 2013; reviewed by *Rodriguez Pineau*, J. Priv. Int. L. 9 (2013) 535; *Siehr*, RabelsZ 79 (2015) 162, 165–170; on this conference, see the reports by *Jayme/C. Zimmer,* IPRax 2013, 99; *Leible/Müller,* YbPIL 14 (2012/13) 137; *Wilke,* GPR 2012, 334; see also *Leible*, in: FS Martiny, 2014, p. 429.
[7] von Hein/Rühl (eds.), Kohärenz, 2015 (forthcoming).
[8] The collected studies and proposals by GEDIP up to 2011 have been published in *Fallon/Kinsch/Kohler* (eds.), Le DIP européen en construction, 2011.
[9] Published with an introduction by *Jayme* in IPRax 2014, 89.
[10] Deutscher Rat für Internationales Privatrecht; a select group of law professors advising the Federal Ministry of Justice and for Consumer Protection. One of the co-authors, *Jan von Hein*, is chairman of the Council's 2nd Commission, dealing with PIL in commercial matters. The views presented in this study are, however, his and the other co-author's own and in no way implicate either the Council or the Ministry.
[11] See the proposal for a new Art. 4a Rome II developed by *Junker*, RIW 2010, 257, 259.
[12] Resolution of the German Council for Private International Law, Special Committee on Financial Market Law, IPRax 2012, 471.
[13] German Council for Private International Law, Special Committee, IPRax 2012, 371.
[14] Sonnenberger (ed.), Vorschläge und Berichte zur Reform des europäischen und deutschen internationalen Gesellschaftsrechts, 2007; for an analysis of this proposal in English, see *Kieninger*, RabelsZ 73 (2009) 607; *Zimmer*, in: Basedow/Baum/Nishitani (eds.) Japanese and European Private International Law in Comparative Perspective, 2008, pp. 209–217; in French, *Sonnenberger*, Rev. crit. dr. int. pr. 102 (2013) 101.

- In the fourth part (infra 0.), we propose a process consisting of three pillars (completing the acquis, consolidating the acquis and improving the institutional framework) that is intended to gradually create a more coherent legislative and institutional framework of European PIL. This framework might in the long term lead to the adoption of a European Code on PIL (see infra 0.).

2. CURRENT STATE OF PLAY

In this part, we analyze the current state of play of European PIL. The first section is devoted to the sources (infra 1.), the second section to the perceived deficiencies of the pertaining rules and regulations (infra 0.).

2.1 Sources of Private International Law

European PIL as it currently stands is not codified in single instrument. It is not even embodied in a single type of instrument. Instead, it is scattered across various instruments of a disparate legal nature, including EU Regulations, EU Directives and international conventions.

EU Regulations

Arguably the most important source of European PIL are directly applicable EU Regulations. They take three different forms: regulations that are exclusively devoted to choice of law, regulations that are exclusively focused on international civil procedure and, finally, combined regulations that contain rules on both choice of law and international civil procedure.

Regulations of the first type are the three so-called Rome Regulations, i.e. the Rome I Regulation dealing with the law applicable to contractual obligations,[1] the Rome II Regulation devoted to the law applicable to non-contractual obligations,[2] and the so-called Rome III Regulation determining the law applicable to divorce and legal separation.[3] The most well-known and arguably most important Regulations of the second type are the Brussels Regulation, recently recast as the Brussels I*bis* Regulation and applicable since 10 January 2015, and the Brussels II*bis* Regulation. The Brussels I*bis* Regulation focuses on jurisdiction, recognition and enforcement of foreign judgements in civil and commercial matters,[4] the Brussels II*bis* Regulation deals with jurisdiction, recognition and enforcement in matrimonial matters and matters of parental responsibility.[5] Both instruments are supplemented by various regulations dealing with specific decisions or establishing special procedures. These include the Regulation on the European Order for Uncontested Claims,[6] the Regulation on the European Order for Payment,[7] the Small Claims Regulation,[8] the Regulation on the European Account Preservation Order[9] and the new Regulation on Mutual Recognition of Protection Measures in Civil Matters.[10] In addition, matters of

[1] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), [2008] OJ L 177/6.
[2] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40.
[3] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, [2010] OJ L 343/10.
[4] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351/1.
[5] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, [2003] OJ L 338/1.
[6] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, [2004] OJ L 143/15 .
[7] Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, [2006] OJ L 339/1.
[8] Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, [2007] OJ L 199/1 .
[9] Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters, [2014] OJ L 189/59.
[10] Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters, [2013] OJ L 181/4.

international judicial assistance (international service of documents, cross-border taking of evidence) are governed by two specific regulations, namely the Service of Process and the Taking of Evidence Regulation.[1]

Regulations of the third type are the Insolvency Regulation[2] and the Succession Regulation.[3] In addition, the two – still pending – proposals on matrimonial property[4] and the property consequences of registered partnerships[5] combine both choice of law and international civil procedure. These two Regulations and the two proposals on the property consequences of marriage and registered partnerships provide for a detailed set of rules on choice of law as well as international civil procedure. A mutual interdependence between choice of law and jurisdiction and enforcement can also be observed in the Maintenance Regulation.[6] In contrast to the Insolvency and Succession Regulation, however, the Maintenance Regulation only contains a detailed set of rules as regards international civil procedure. As far as choice of law is concerned, Art. 15 Maintenance Regulation merely provides a link to the Hague Protocol on the law applicable to maintenance obligations[7] and, in substance, does not itself provide for any specifically European choice-of-law rules.

It should of course be noted that the above distinction between regulations devoted to choice of law, regulations to international civil procedure and combined regulations does not imply that regulations of the first two types exist in splendid isolation. As a matter of fact, the Rome I and II Regulations contain recitals that exhort practitioners to interpret and apply the provisions of the Rome I and II Regulations as well as the Brussels I*bis* Regulation in a coherent and harmonious manner (see Recitals 7, 15, 17 and 24 Rome I, Recital 7 Rome II).[8] Yet the precise reach of these recitals is hard to define (see infra 0.). At least, they require a consistent interpretation of the said instruments that acknowledges the functional interdependence of choice of law on the one hand and international civil procedure on the other.[9]

EU Directives

In addition to EU Regulations, rules of PIL are occasionally to be found in EU Directives, notably those on consumer protection. These rules usually require Member States to ensure that consumers are not deprived of the protection granted by the respective Directive by virtue of the choice of the law of a non-EU Member State if the contract has a close connection with the territory of the Member States.[10] Naturally, in the light of Art. 3(4) and 6(2) Rome I it is open to debate whether such rules are still necessary.[11] The recently enacted Consumer Rights Directive[12] has answered this question in the negative: it contains no specific choice-of-law rule along the

[1] Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000, [2007] OJ L 324/79; Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, [2001] OJ L 174/1.

[2] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L 160/1; to be replaced soon by a recast version, cf. European Commission, Press Release, 4 December 2014, IP/14/2322.

[3] Supra fn. 1.

[4] Proposal of 16 March 2011 for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final.

[5] Proposal of 16 March 2011 for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 final.

[6] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L 7/1.

[7] Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations, [2009] OJ L 331/19.

[8] Pursuant to Art. 80 2nd sentence Brussels I*bis*, references to the former Brussels I Regulation must be read as references to the recast version.

[9] Cf. *Lüttringhaus*, RabelsZ 77 (2013) 31, 66; *Rühl*, GPR 2013, 122.

[10] Council Directive (EEC) No 13/1993 of 5 April 1993 on unfair terms in consumer contracts, [1993] OJ L 95/29; Directive (EC) No 44/1999 of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L 171/12; Directive (EC) No 65/2002 of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, [2002] OJ L 271/16; Directive (EC) No 48/2008 of the European parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, [2008] OJ L 133/66.

[11] For a detailed analysis, see *Kieninger*, in: FS Kropholler, 2008, p. 499; *Leible*, in: FS von Hoffmann, 2011, p. 230.

[12] Directive (EU) No 83/2011 of the European Parliament and of the Council of 25 October 2011 on consumer right, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Par-liament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L 304/64.

above mentioned lines, but rather refers to the protection granted to the consumer under the Rome I Regulation in Recital 58.

EU Primary Law (TFEU)

A further source of European PIL, at least in a broad sense, is EU primary law as interpreted by the Court of Justice (ECJ).[1] By their nature, neither the founding treaties nor the TFEU or the TEU contain choice-of-law rules in a technical sense. However, the basic freedoms guaranteed by the TFEU have had a profound impact on domestic choice-of-law rules, for example on international company law. Here, the ECJ's reasoning in *Centros* and other decisions (*Überseering*, *InspireArt*, etc.) forced Member States to abandon the former real seat theory, at least with regard to companies migrating from one Member State that adheres to the incorporation theory to another Member State.[2] Another example relates to the law of names. Here, the ECJ has developed a principle of recognition that requires Member States to restrict nationality as a connecting factor and to accept a name that a person has lawfully acquired in another Member State provided the result does not violate domestic public policy.[3]

International Conventions

A final source of European PIL are international conventions concluded by the EU. The Hague Protocol on the law applicable to maintenance obligations has already been mentioned (see supra 1.). By means of the revised Lugano Convention of 2007,[4] the former Brussels I Regulation has been extended to some of the EFTA states (Switzerland, Norway and Iceland).[5] In addition, the EU is also party to the Hague Convention on Choice-of-Court Agreements of 2005, which, however, has yet to enter into force.[6] Finally, the EU is bound to respect international conventions concluded by its Member States in specific areas of PIL before a pertinent EU Regulation has been enacted (see infra 0.).

2.2 Deficiencies of European Private International Law

As becomes clear from the previous section, European PIL is characterized by a multitude of different sources. This multitude gives rise to a number of problems that are detailed in the following section.

Gaps

The first problem of European PIL as it currently stands is that it suffers from numerous gaps. These gaps have been described in great detail by the Kramer study in 2012,[7] which need not be reproduced here. Generally, four distinct types of gaps may be distinguished.

Areas of law not covered by EU legislation

First, entire areas of PIL law are not covered by secondary EU legislation. Take, for example, the law of companies. Except for supplementary choice-of-law rules relating to genuine EU types of companies, such as the Societas Europaea,[8] and specific choice-of-law rules relating to takeovers in the pertinent directive,[1] all

[1] In order to distinguish the „Court of Justice" from the larger institution of the „Court of Justice of the European Union" – which also comprises the General Court and the Civil Service Tribunal (Article 19 TEU) – we use the traditional abbreviation ECJ here, although it is no longer the official one.

[2] ECJ, Case C-212/97 *Centros*, [1999] ECR I-1459; ECJ, Case C-208/00 *Überseering*, [2002] ECR I-9919; ECJ, Case C-167/01 *Inspire Art*, [2003] ECR I-10159; but cf. the more restrictive approach in ECJ, Case C-210/06 *Cartesio*, [2009] ECR I-09641; ECJ, Case 378/10 *VALE*, ECLI:EU:C:2012:440.

[3] ECJ, Case C-148/02 *Garcia Avello,* [2003] ECR I-11613, note *Henrich*, FamRZ 2004, 173; ECJ, Case C-353/06 *Grunkin-Paul,* [2008] ECR I-7639 = FamRZ 2008, 2089, note *Funken*; ECJ, Case C-208/09 *Sayn-Wittgenstein,* [2010] ECR I-13693 = FamRZ 2011, 1486, note *Wall*, StAZ 2011, 203; ECJ, Case C-391/09 *Malgožata Runevič-Vardyn,* [2011] ECR I-03787 = StAZ 2011, 274, note *Ho-Dac*, GPR 2011, 317.

[4] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2009] OJ L 147/5.

[5] The Lugano Convention of 2007 entered into force between the European Union and Norway on 1 January 2010 (cf. [2010] OJ L 140/1), between the European Union and the Swiss Confederation on 1 January 2011 and between the European Union and Iceland on 1 May 2011 (cf. [2011] OJ L 138/1).

[6] The Convention was signed by the European Union on 1 April 2009 on basis of the Council Decision 2009/397/EC, [2009] OJ L 133/1. On 30 January 2014 the European Commission adopted a proposal for a Council decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements (cf. COM[2014] 46 final). Once the Council Decision will be enacted and the approval effected, the European Union will join Mexico as a contracting party to the Convention, thereby triggering its entry into force.

[7] *Kramer et al.*, A European Framework for PIL, 2012.

[8] Cf. Art. 9(1)(c) Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), [2001] OJ L 294/1.

issues that matter in practice, such as the legal capacity of companies and the law applicable to cross-border transfers of a company's seat, are subject to domestic PIL. To be sure, these rules have been heavily influenced by ECJ case law on freedom of movement (see supra 0.). Nonetheless, there are wide areas of company law that remain unaffected and that accordingly are governed by purely national rules. Another area not covered by secondary EU legislation is the law of names of natural persons. Although this area of law is key for the cross-border mobility of natural persons and has repeatedly induced preliminary references to the ECJ (see supra 0.), clear-cut European choice-of-law rules are still lacking.[2]

Areas of law only partially covered by EU legislation

Secondly, certain areas of PIL are only partially covered by secondary EU legislation. This holds true, for example, for the law of obligations. Here, the Rome I and II Regulation provide for a near to comprehensive set of choice-of-law rules (see supra 1.). However, a number of important issues are not regulated.

As regards the Rome I Regulation one may mention, for example, the law of agency which is excluded from the Regulation's scope by virtue of Art. 1(2)(g). In addition, pursuant to Art. 1(2)(e) the substantive validity of jurisdiction agreements is not covered by the Regulation. This in turn is problematic as it causes frictions with the Brussels I*bis* Regulation. According to Art. 25(1) 1st sentence Brussels I*bis*, the question as to whether a choice-of-court "agreement is null and void as to its substantive validity" will be judged in accordance with the law of the chosen court.[3] Yet, Recital 20 of the Brussels I*bis* Regulation makes clear that this reference is not directed at the chosen forum's substantive law – which otherwise would have been the usual approach in EU legislation, at least with regard to conflicts rules designating the law of a Member State. Instead, the reference is to be understood as including the choice-of-law rules of that Member State, i.e. the national rules of PIL. It follows that the substantive validity of forum selection clauses is likely to be determined by different legal standards in the Member States.

Gaps in the Rome II Regulation give rise to similar problems. Take for example non-contractual obligations arising out of violations of privacy and rights relating to the personality, including defamation, which are excluded from the Rome II Regulation by virtue of Art. 1(2)(g). Despite efforts by the European Parliament to amend the Regulation,[4] a choice-of-law rule on these matters is still lacking.[5] In contrast, they are covered by the Brussels I*bis* Regulation. It follows that as regards the violation of personality rights there is considerable room left for forum shopping and so-called "libel tourism".[6]

Other gaps in the Rome II Regulation concern pervasive problems of the PIL of obligations:

Whereas Art. 17 Rome I contains a rule on set-off with regard to contractual obligations, there is no corresponding provision in Rome II, thus leading to a controversy about an analogous application of Art. 17 Rome I.[7]

Whereas Art. 3(1) 3rd sentence Rome I expressly allows the parties to submit parts of their contract to different laws, Art. 14 Rome II is silent on this issue, creating doubts whether *dépeçage* is also permissible under Rome II.[8]

Whereas Art. 3(5) Rome I determines which law governs the existence and validity of a choice-of-law clause, Art. 14 Rome II says nothing about the law applicable to choice-of-law clauses, triggering again a discussion about an analogous application of Art. 3(5) Rome I.[1]

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[1] Cf. Art. 4 Directive (EC) No 25/2004 of the European Parliament and of the Council of 21 April 2004 on takeover bids, [2004] OJ L 142/12.
[2] See, however, the proposal recently submitted by the Working Group of the Federal Association of German Civil Status Registrars: One Name Throughout Europe – Draft for a European Regulation on the Law Applicable to Names, YbPIL 15 (2013/2014) p. 31.
[3] "Substantive validity" must not be confused with the formal validity of a choice-of-court agreement; the latter question remains subject to Article 25(1) 3rd sentence Brussels I*bis*.
[4] Report with recommendations to the Commission on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), May 2nd, 2012, [2013] OJ C 261 E/17.
[5] On the proposal made by the German Council for PIL, see supra 0.
[6] *Hartley*, Int. Comp. L. Q. 2010, 25.
[7] See OGH (Austria) 21 May 2014 – 3 Ob 42/14v, ZfRV 2014, 182; Rauscher/*von Hein* Art. 17 Rome I para. 7, with further references.
[8] See Calliess/*von Hein* Art. 14 Rome II para. 35 (denying *dépeçage*); MüKo/*Junker* Article 14 Rome II para. 37; BeckOGK/*Rühl* Art. 14 Rome II, para. 87 (forthcoming) (arguing in favour of an analogy).

General Principles of PIL

The third type of gap relates to the general principles of PIL.[2] Take for example the regulation of dual nationality.[3] Although a person's citizenship is used as a connecting factor in various regulations (e.g. Art. 8(c) Rome III, Art. 3(1)(b) Brussels II*bis*), there are no explicit rules on whether preference should be given to a person's effective nationality, the nationality of the forum or whether the person concerned should be free to choose between several nationalities regardless of their effectiveness. Art. 22(1) 2nd sentence of the Succession Regulation provides that a person with dual nationality may choose either one of them to determine the applicable law; this rule is generally understood in the sense that the chosen nationality need not be the person's effective one.[4] In contrast, there is no express provision to be found in the Brussels II*bis* and the Rome III Regulation. With regard to Art. 3(1)(b) Brussels II*bis*, the ECJ endorsed the approach of the Succession Regulation.[5] Recital 22 Rome III, in contrast, refers to the domestic PIL rules of the participating Member States on this issue but adds the caveat that the result of their application must not contradict the general principles of EU law. This rather open-ended approach creates legal insecurity because domestic PIL rules nearly always prefer a person's nationality that coincides with the *lex fori*, regardless of its effectiveness.[6] As a result, the international harmony of decisions is endangered. Moreover, such a practice may amount to discrimination on grounds of nationality, which is prohibited by Art. 18 TFEU. The German Federal Court of Justice has recently touched upon this issue in a case involving a German-Bulgarian national, but refrained from referring the case to the ECJ because the German nationality was also the effective one.[7]

Other gaps relating to general principles of PIL concern incidental questions.[8] For example Art. 1(2) Rome III (read in conjunction with Recital 10 para. 3) makes clear that the scope of the Regulation does not encompass preliminary questions, but rather that such questions remain subject to the choice-of-law rules of the *lex fori*. Under the Succession Regulation, however, it is a matter for debate whether the choice-of-law rules governing a person's succession should also govern preliminary questions such as the validity of a marriage.[9]

Respect for international conventions

A fourth type of gap finally results from the application of international conventions that take precedence over existing European rules on PIL. Such conventions take two distinct forms.

The first form results from a conscious decision of the European legislature not to duplicate international conventions. Family law provides an example, in that here a strictly regional approach to PIL would endanger the achievements reached within the framework of the Hague Conference. Therefore, the European legislature deliberately refrained from exercising its legislative competence in the field of protection of adults and encouraged interested Member States to ratify the Hague Adult Protection Convention.[10] In addition, European law-makers decided to restrict the Brussels II*bis* Regulation to matters of international civil procedure and to leave intact the choice-of-law regime of the Hague Child Protection Convention.[11] By the same token, the Maintenance Regulation is limited to procedural issues and refers to the Hague Protocol as regards the choice-of-law aspects.[12] It should not be overlooked, however, that the combination of EU rules on procedural issues

[1] See Calliess/*von Hein* Art. 14 Rome II para. 29; BeckOGK/*Rühl* Art. 14 Rome II, paras. 105 et seq. (forthcoming) (arguing in favour of an analogy), for a different view, cf. MüKo/*Junker* Article 14 Rome II paras. 25 et seq (favouring the lex fori).

[2] See *Heinze*, in: FS Kropholler, 2008, p. 105; *Kreuzer*, in: Jud/Rechberger/Reichelt (eds.), Kollisionsrecht in der Europäischen Union, 2008, p. 1; *Meeusen*, in: Liber Amicorum Erauw, 2014, p. 139, 155 et seq.; MüKo/*von Hein* Art. 3 EGBGB paras. 66–68; *Sonnenberger*, in: FS Kropholler, 2008, p. 227.

[3] Cf. *Bariatti*, YbPIL 13 (2011) 1; *Basedow*, Rev. crit. dr. int. pr. 2010, 427; *Kruger/Verhellen*, J. Priv. Int. L. 7 (2011), 601; *Meeusen*, in: Liber Amicorum Erauw, 2014, p. 139, 148 et seq.; MüKo/*von Hein* Art. 5 EGBGB paras. 72–89.

[4] MüKo/*von Hein* Art. 5 EGBGB para. 73, with further references.

[5] ECJ, Case C-168/08 *Hadadi/Mesko*, [2009] ECR I-6871 nos. 44–58.

[6] E.g., Art. 5(1) 2nd sentence of the Introductory Act to the German Civil Code (EGBGB); § 9(1) of the Austrian International Private Law Code.

[7] See German Federal Court of Justice (Bundesgerichtshof), 19 February 2014 – XII ZB 180/12, NJW 2014, 1383.

[8] Cf. *Gössl*, J. Priv. Int. L. 8 (2012) 63.

[9] See MüKo/*von Hein* Einl. IPR para. 188, with further references.

[10] See Council Press Release No. 14667/08, p. 21; for a more detailed account, see Staudinger/*von Hein* (2014) Vorbem. Art. 24 EGBGB para. 12a.

[11] [2003] OJ L 49/3.

[12] See Art. 15 Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, [2009] OJ L 7/1.

and Hague rules on choice of law also causes difficulties.[1] In particular, it has led to a controversial discussion about whether the basic principle of *lex fori in foro proprio* that underlies the Child Protection Convention's conflicts rules is also applicable when jurisdiction is not derived from a rule found in the Convention itself, but (merely) in Brussels II*bis*.[2]

The second form of gap that results from the application of international conventions is distinct from the gaps discussed thus far. They follow not from a lack of provisions as such, but rather from self-restraint of the European legislature when European choice-of-law rules meet choice-of-law rules in international conventions: Art. 25 Rome I, Art. 28 Rome II, Art. 19 Rome III and Art. 75 of the Succession Regulation EU provide that the EU Regulations in question do not prejudice the application of international conventions, unless the convention in question is in force only between Member States. However, since most international conventions in the field, notably the Hague Traffic Accident Convention[3] and the Hague Product Liability Convention,[4] have a sizeable number of non-EU members, the latter exception is of little practical significance.[5]

Redundancies

Next to gaps, the second deficiency of European PIL as it currently stands is that it contains a number of redundancies,for example on the issue of consumer protection. As outlined earlier (see supra 1.), there are a number of Directives that require Member States to ensure that consumers are not deprived of the protection granted by the respective Directive by virtue of the choice of the law of a non-EU Member State if the contract has a close connection with the territory of the Member States. In addition, however, Art. 3(4) Rome I Regulation provides that a choice of non-Member State law may not prejudice the application of mandatory provisions of European Union law, where all relevant elements are located in one or more Member States. It is obvious that the combination of choice-of-law rules in consumer protection directives and Art. 3(4) Rome I Regulation creates unnecessary redundancies (see supra 1.).

Other examples of redundancies relate to the regulation of general principles of PIL. Here, each of the above-mentioned EU Regulations contains its own rules on *renvoi*, public policy or multi-unit states, and thus effectively regulates the same issue again and again. The same holds true for a number pervasive issues in the PIL of obligations. Since EU legislation in the field distinguishes between contractual obligations and non-contractual obligations, the Rome I and II Regulation both contain (more or less identical) rules on subrogation (Art. 15 Rome I, Art. 19 Rome II), multiple liability (Art. 16 Rome I, Art. 20 Rome II), the burden of proof (Art. 18 Rome I, Art. 22 Rome II) and the formal validity of unilateral acts (Art. 11(3) Rome I, Art. 21 Rome II). Of course, it could be argued that redundancies of this sort are a merely cosmetic concern as long as the rules in question are the same in substance. However, even identical rules may lead to diverging interpretations in practice. Moreover, practitioners dealing with a certain problem (e.g. the characterization of prima facie evidence[6]) in the context of one Regulation (e.g. Art. 18 Rome I on the burden of proof) may overlook precedents handed down in the context of its twin provision in another Regulation (e.g. Art. 22 Rome II). Furthermore, Member States' courts may be unsure whether, for example, an *acte éclairé* concerning the Rome II variant may be applied to the twin provision in the Rome I Regulation. Thus, judges may be tempted to request an unnecessary preliminary ruling from the ECJ.

Incoherences

The final deficiency of current European PIL is closely linked to the second in that the problems posed by redundant provisions are exacerbated when the rules on similar subjects are phrased inconsistently. Such inconsistencies again exist with regard to the general principles of PIL, notably dual nationality and incidental questions (see supra 0.). Other inconsistencies relate to the rules on *renvoi*: whereas the Rome I, Rome II, and

[1] Cf. the critical assessment by *Czepelak*, Eur. Rev. Priv. L. 2010, 705, 717 et seq.
[2] On the state of the controversy, see Staudinger/*Henrich* (2014) Art. 21 EGBGB para. 81; Staudinger/*von Hein* (2014) Vorbem. Art. 24 EGBGB para. 2c, both with further references.
[3] Hague Convention on the Law Applicable to Traffic Accidents of May 4, 1971, English text available at http://www.hcch.net/index_en.php?act=conventions.text&cid=81.
[4] Hague Convention on the Law Applicable to Products Liability of Oct. 2, 1973, RabelsZ 37 (1973) 594 (English text).
[5] Cf. *von Hein*, RabelsZ 73 (2009) 461, 473 et seq.
[6] Cf. Rauscher/*von Hein* Art. 18 Rome I paras. 8 et seq.

Rome III Regulations exclude any form of *renvoi*, (at least in principle),[1] Art. 34 (1) of the recently adopted Succession Regulation takes into account foreign choice-of-law rules of a third (i.e., non-Member) State when such rules refer back to the law of a Member State or when they refer to the law of a third state which would apply its own law. In addition Art. 25(1) 1st sentence of the Brussels I*bis* Regulation reintroduces *renvoi* with regard to Member States' laws as far as the substantive validity of a choice-of-court agreement is concerned (see supra 0.). These recent developments have prompted a debate about whether *renvoi* should be re-introduced into the current proposals on the property consequences of marriage and registered partnerships.[2]

Further discrepancies exist as regards the treatment of multi-unit states:[3] whereas the Rome I and II Regulations treat legal sub-systems (e.g. Scotland) of a multi-unit state (e.g. the United Kingdom) as separate countries for choice-of-law purposes (Art. 22(1) Rome I, Art. 25(1) Rome II), the Rome III Regulation (Art. 14), the Hague Protocol on Maintenance (Art. 16) and the Succession Regulation (Art. 36) contain much more nuanced provisions which under certain circumstances take into account foreign interlocal rules. Nevertheless, these rules differ insofar as foreign interlocal law should be applied only when a European PIL rule uses nationality as a connecting factor (cf. Art. 14 Rome III) or whether foreign interlocal rules must be heeded even if a European PIL rule refers to a person's habitual residence (e.g. Art. 16(2)(a) Hague Maintenance Protocol).

More incoherences become apparent when looking into the PIL of obligations. Here, the rules on free choice of law differ widely in the Rome I and II Regulation. To begin with, Art. 3 Rome I regulates choice-of-law clauses in much greater detail than Art. 14 Rome II (see supra 0.). In addition, the wording of the two provisions diverge, notably as regards the requirements of an implied choice of law.[4] Finally, both Regulations take different approaches regarding the protection of weaker parties, notably consumers, from the dangers of a free choice of law.[5] Thus, whereas the Rome I Regulation allows consumers to choose the applicable contract law before and after conclusion of a contract, the Rome II Regulation limits the consumer's right to choose the applicable tort law to the time after occurrence of the event giving rise to the damage. Furthermore, the Rome I Regulation limits the effects of such a choice with the help of the so-called preferential law approach embodied in Art. 6(2). The Rome II Regulation, in contrast does not limit the effects of a choice of law in such a way.

At times incoherences may be mitigated through a consistent interpretation as expressly required by Recitals 7, 17, 24 of the Rome I Regulation and Recital 7 of the Rome II Regulation. However, a consistent interpretation is difficult if not impossible to undertake where the wording of the provisions in question differ. In addition, it is not clear to what extent the ECJ actually embraces the concept of a consistent interpretation. In its *Emrek* decision of 2013, for example, the Court did not draw upon the Rome I Regulation in a case that required an interpretation of Art. 15(1)(c) of the former Brussels I Regulation (today Art. 17(1)(c) Brussels I*bis*). In the underlying case, a German consumer had concluded a contract with a French trader in France without being aware that the trader also ran a website directed towards German consumers.[6] In the light of Recital 25 of the Rome I Regulation, one would have been inclined to believe that, under such circumstances, the consumer should not be able to sue the trader in the plaintiff's home state, because the contract in question was not "concluded as a result [!] of […] activities" the trader had directed towards the country of the consumer's habitual residence.[7] Nonetheless, the ECJ decided that "Article 15(1)(c) [Brussels I] must be interpreted as meaning that that it does not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile, namely an internet site, and the conclusion of the contract with that consumer."[8] While this line of reasoning is debatable, it should be

[1] For an overview, see MüKo/*von Hein* Art. 4 EGBGB paras. 109–156, with further references.
[2] See MüKo/*von Hein* Art. 4 EGBGB paras. 136–142.
[3] See *Christandl*, J. Priv. Int. L. 9 (2013) 219; *Eichel,* in: Leible/Unberath (eds.), Rom 0-Verordnung, 2013, p. 397; MüKo/*von Hein* Art. 4 EGBGB paras. 216–238.
[4] *Czepelak*, Eur. Rev. Priv. L. 2010, 705, 720 et seq.
[5] See for a detailed analysis *Rühl*, in: FS von Hoffmann, 2011, pp. 364 et seqq.; *id.,* J. Priv. Int. L. 10 (2014) 335.
[6] ECJ, 17 October 2013, Case C-218/12 *Emrek ./. Sabranovic*, ECLI:EU:C:2013:666 = IPRax 2014, 63 with a critical note by *Rühl*, 41 = NJW 2013, 3504 with a critical note by *Staudinger/Steinrötter* = JZ 2014, 297 with a critical note by *Klöpfer/Wendelstein*; the decision is likewise rejected by *Mayr*, in: Czernich/Kodek/Mayr (eds.), Europäisches Gerichtsstands- und Vollstreckungsrecht, 2015, Art. 17 Brussels I*bis* para. 35; *Bisping*, Eur. Rev. Priv. L. 2014, 513, 528 et seqq.; *Keiler/Binder,* euvr 2013, 230, 232 et seqq.; *Piroutek/Reinhold,* euvr 2014, 41, 43 et seqq.; *Rühl*, IPRax 2014, 41; *Schultheiß,* EuZW 2013, 944, 945; *Staudinger,* DAR 2013, 697, 697; *Wilke,* EuZW 2014, 13.
[7] This had been the clearly prevailing view before *Emrek*, see *Kropholler/von Hein*, EuZPR, Art. 15 EuGVO para. 26, with further references.
[8] ECJ, 17 October 2013, Case C-218/12 *Emrek ./. Sabranovic*, IPRax 2014, 63.

noted that the goal of consistency between Brussels I*bis* and the Rome I/II Regulations should not be misunderstood in the sense of a strict parallelism between jurisdiction and the determination of the applicable law (see infra 4.1.1.4).

2.3 Conclusion

The current framework of European PIL is characterized by a multitude of legal sources that suffer from various deficiencies, notably gaps, redundancies and incoherences. Whereas a number of issues are not regulated at all (see supra 0.), others are regulated again and again in different contexts (see supra 0.), while again others are regulated in different and arguably inconsistent ways (see supra 0.). As a result, the body of European PIL as it currently stands does not exhaust all avenues to reduce the legal uncertainty associated with cross-border transactions and to facilitate and foster cross-border trade and life.[1] To the contrary: the body of rules currently in force creates unnecessary complexity and intransparency that should be reduced by appropriate legislative measures.

3. POSSIBLE WAYS FORWARD: OVERVIEW

As pointed out earlier (see supra 0.) recent years have seen the rise of a debate among both academics and political institutions about how the legislative framework in the field of PIL can be improved. In the remaining parts of the study, we will present various proposals for reform that are currently under discussion.[2] Most importantly, we will examine whether a codification of European PIL is able to eliminate the above-outlined deficiencies.

However, before going into the details three remarks are appropriate: first, although we believe that, in the long run, the problems outlined above can probably best be solved through legislative action of some form,[3] this does not mean that other supporting measures may not help to improve the situation (cf. infra 0.). Second, the proposals discussed in the following are not mutually exclusive, but may be viewed as complementary actions. Third, that the term "codification" is laden with history, national culture, and – most importantly – emotions. One may, therefore, doubt whether the term should actually be used in a uniquely European context without further terminological clarification.

3.1 Comprehensive Codification

The most far-reaching proposal currently under discussion is the adoption of a "European Code on PIL",[4] an idea that has received considerable attention and support (see supra 0.).[5] The following section sheds light on the possible meanings of "codification" as well as possible contents of a "European Code on PIL".

Codification or Compilation: What's in a name?

From a continental European lawyer's perspective, the notions of "codification" or "code" have a highly specific meaning.[6] Usually, a codification or a code is understood as the clear, systematic and comprehensive recording of an entire legal field in a single piece of legislation. Codifications in this sense are commonly found on the European continent in the field of substantive private law. At times, but less often, they are also to be found in the field of PIL (e.g. Austria, Belgium, Czech Republic, Italy, Slovenia, Switzerland). In contrast, codifications are largely unknown in Ireland and the United Kingdom, i.e. those European Union Member States that belong to the common law tradition. The picture is different when looking at the European level. Here, the notion of

[1] Cf. *Czepelak*, Eur. Rev. Priv. L. 2010, 705, 715 et seq.; *Meeusen*, in: Liber Amicorum Erauw, 2014, p. 139, 151.
[2] See for an overview *Kramer*, European PIL: The Way Forward, 2014.
[3] This view is shared, for example, by *Wilke*, in: Leible/Unberath (eds.), Rom 0-Verordnung, 2013, p. 23, 25.
[4] *Czepelak*, Eur. Rev. Priv. L. 2010, 705, 727 et seq.; *Rauscher*, in: Bammer et al. (eds.), Festgabe Machacek und Matscher, 2008, pp. 665 et seqq. See also the contributions in Fallon/Lagarde/Poillot-Peruzzetto (eds.), Quelle architecture,2008.
[5] See for an overview *Kramer*, European PIL: The Way Forward, 2014, at 2.3.
[6] See *Schmidt*, in: Basedow/Hopt/Zimmermann (eds.), Max Planck Encyclopedia of European Private Law, 2012, pp. 221 et seqq.; *Zimmermann*, Eur. Rev. Priv. L. 3 (1995) 95 et seqq.

codification is very often used to describe something that might better be termed compilation.[1] According to an interinstitutional agreement of 1994, the act of codification is defined as a "procedure for repealing the acts to be codified an replacing them with a single act containing no substantive change to those acts".[2] Understood in this way, the notion of "codification" refers to something that has little to do with what the Member States associate with it. In this study, we apply the notion of codification when we refer to the systematic and comprehensive recording of PIL, whereas we reserve the notions of consolidation or compilation for less ambitious reform projects.

One or two Codes: Choice of Law and Civil Procedure

A "codification" may take different shapes, depending on how the "legal field" in question is defined.[3] If a "legal field" is understood to refer to PIL in a wider sense, covering both choice of law and international civil procedure, then a codification should contain provisions relating to the applicable law as well as to jurisdiction, recognition and enforcement of judgments. If, however, choice of law or international civil procedure are treated as separate "legal fields", a codification will be limited to either choice of law or international civil procedure, thus, effectively requiring two codifications.

In domestic and European legislation, both forms of codification are popular.[4] The first form, i.e. a combined codification of choice of law and international civil procedure, is to be found, for example, in Belgium,[5] the Czech Republic,[6] Hungary,[7] Italy,[8] Slovenia[9] and Switzerland.[10] It is also the form the European legislature has more recently applied in the field of family and succession law (see supra 0.). The second form, a separate codification for choice of law and international civil procedure respectively is currently to be found, for example, in Austria,[11] Estonia,[12] Germany,[13] and Poland.[14] It is also used by the European legislature in the field of civil and commercial matters as embodied in the Rome I, Rome II and Brussels I*bis* Regulations (see supra at 1.). A separate codification, however, is also to be found in the area of family law as regards divorce and legal separation. Here, the applicable choice-of-law rules are to be found in the Rome III Regulation, whereas matters of jurisdiction, recognition and enforcement are governed by the Brussels II*bis* Regulation.

In the debate about a possible codification of European PIL, some proponents of a codification favour a single code that covers both choice of law and international law procedure,[15] while others seem to argue for two separate codifications.[16]

3.2 Sectoral Codifications

A European Code on PIL that provides for a comprehensive account of choice of law and/or international civil procedure is naturally not the only way forward. In fact, an alternative course of action may be the adoption of

[1] *Basedow*, in: von Hein/Rühl (eds.), Kohärenz, 2015 (forthcoming).
[2] Interinstitutional Agreement of 20 December 1994, Accelerated working method for the official codification of legislative texts, OJ 1996 C 102/2, at No. 1. See also at No. 3 and No. 6: "3. The Commission undertakes not to introduce in its codification proposals any substantive changes to the acts to be codified. ... 6. The purpose of the Commission proposal, namely the straightforward codification of existing texts, constitutes a legal limit, prohibiting any substantive change by the European Parliament or Council."
[3] See for a detailed analysis *Dutta*, in: von Hein/Rühl (eds.), Kohärenz, 2015 (forthcoming); *Kadner Graziano*, ibid.
[4] For a general survey of legislative trends, see *Symeonides*, Codifying Choice of Law Around the World, pp. 1–37.
[5] *Francq*, Belgium, in: Eur. Ency. PIL, vol 3, 2016 (forthcoming).
[6] *Pauknerova*, Czech Republic, in: Eur. Ency. PIL (fn. 5).
[7] *Vékás*, Hungary, in: Eur. Ency. PIL (fn. 5).
[8] *Bonomi/Ballarino*, Italy, in: Eur. Ency. PIL (fn. 5).
[9] *Kramberger*, Slovenia, in: Eur. Ency. PIL (fn. 5).
[10] *Kleiner*, Switzerland, in: Eur. Ency. PIL (fn. 5).
[11] *Heiss*, Austria, in Eur. Ency. PIL (fn. 5).
[12] *Halling*, Estonia, in: Eur. Ency. PIL (fn. 5).
[13] *von Hein*, Germany, in: Eur. Ency. PIL (fn. 5).
[14] *Mączyński*, Poland, in: Eur. Ency. PIL (fn. 5).
[15] See, for example *Lagarde*, RabelsZ 75 (2011) 673 et seqq.; *Rauscher*, in: Bammer et al. (eds.), Festgabe Machacek und Matscher, 2008, pp. 665 et seqq. who also presents a detailed table of contents for such a unified codification; *Corneloup/Nourissat*, in: Fallon/Lagarde/Poillot-Peruzzetto (eds.), Quelle architecture, 2011, p. 257, 263 et seqq.
[16] See, for example, *Adolphsen*, in: FS Kaissis, 2012, pp. 1 et seqq.

(more) sectoral codifications that are limited in their scope to specific areas.[1] In its 2010 Stockholm Programme, the European Council stressed that "the process of harmonising conflict-of-law rules at Union level should also continue in areas where it is necessary, …".[2] And in its communication of March 2014, the Commission suggests that "initiatives to complement existing justice policies and legal instruments may … have to be envisaged where appropriate."[3] It should be noted, however, that the idea of having (more) sectoral codifications – while meant as a provisional alternative to a comprehensive codification – does not rule out the possibility of having a comprehensive codification at a later stage. In fact, most authors who argue for more sectoral codifications regard these as one step on the way towards a European Code on PIL.[4]

The design of sectoral codifications may vary depending on how the limits of a certain legal "sector" or "area" are defined (see supra 1.). Sectoral regulations may either be confined to choice of law, such as the current Rome I, II and III Regulations. Or they may be limited to issues of international civil procedure like the Brussels I*bis* and the Brussels II*bis* Regulations (see supra 1.). Alternatively, they may encompass both choice-of-law rules and rules on international civil procedure following the example of the Succession Regulation and, arguably, the Maintenance Regulation (see supra 1.). Current projects do not reveal a clear tendency of the European legislature of how to proceed. The two – still pending – proposals relating to the property consequences of marriage and registered partnerships, for example, aim for a sectoral codification that encompasses both issues of choice of law and international civil procedure. In contrast, it seems that the legislature strives for a regulation limited to issues of choice of law as regards companies. Thus in August 2014, the Commission issued a call for tenders relating to a study on the law applicable to companies,[5] which is likely to lead to the adoption of a choice of law regulation for companies.

3.3 Codification of General Principles

A third way forward consists in the codification of general principles of European PIL. Like a comprehensive codification, a codification of general principles may come in different forms. Thus it may either be limited to general principles of choice of law, or to general principles of international civil procedure or it may cover both general principles of choice of law and international civil procedure. In all three cases, the codification may be limited to certain subject areas such as civil and commercial matters, family or succession matters, or it may encompass choice of and/or international civil procedure as such.

To the extent that the codification of general principles is currently under discussion, authors usually confine their proposals to choice of law. More specifically, they argue for adoption of what has been dubbed a "Rome 0-Regulation".[6] Occasionally, however, it is is also argued that a general part should cover both aspects of choice of law and international civil procedure.[7] In any event, no matter what the precise scope of any codification of general principles may be, it can – just like sectoral codifications – be conceived as a first step towards a comprehensive European Code on PIL. In fact, it is usually understood that general principles would form an integral part of a European Code on PIL.[8] This is true, for example, for the "Embryon de règlement d'un Code

[1] See, for example, *Basedow*, in: von Hein/Rühl (eds.), Kohärenz, 2015 (forthcoming); *Kramer*, European PIL: The Way Forward, 2014, at No. 5.4.1.

[2] European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, OJ 2010 C 115/1, 13. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens, Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, p. 25 (envisioning a Green paper on PIL aspects, including applicable law, relating to companies, associations and other legal persons).

[3] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final, at No. 4.3.

[4] See, for example, *Kramer*, European PIL: The Way Forward, 2014, at No. 5.4.1.

[5] Open call for Tender of 6 August 2014 JUST/2014/JCOO/PR/CIVI/0051: Study on the law applicable to companies with the aim of a possible harmonization of conflict of law rules on the matter, 2014/S 149-267126, JUST/A/4/MB/ARES(2014)2599553.

[6] See, for example, *Leible*, in: FS Martiny, 2014, pp. 429 et seqq.; *Leible/Müller*, YbPIL 2012/2013, 137 et seqq. See also most of the contributions in Leible/Unberath (eds.), Rom 0-Verordnung, 2013; Leible (ed.), General Principles of European Private International Law, 2015 (forthcoming).

[7] See, for example, *Lagarde*, RabelsZ 75 (2011) 673 et seqq. See also *Corneloup/Nourissat*, in: Fallon/Lagarde/Poillot-Peruzzetto (eds.), Quelle architecture, 2011, p. 257, 265 et seqq.

[8] See, for example, *Corneloup/Nourissat*, in: Fallon/Lagarde/Poillot-Peruzzetto (eds.), Quelle architecture, 2011, p. 257, 263 et seqq.

européen de droit international privé" presented by Paul Lagarde in 2011: while the proposal is limited to general principles, it is evident from the title that it is assumed to be the foundation for a much more comprehensive codification of European PIL.

On the European level, the idea of codifying general principles has not attracted very much attention or interest up to date.[1] However, it may be understood as falling under the notion of codification as it is used by the European Commission in its communication of March 2014. This is because, according to the communication, codification does not have to be comprehensive. It may also extend to "certain parts of the existing EU legislation".[2] Whether the codification of general principles would actually be attractive for national and European policy-makers is clearly a separate question.

4. POSSIBLE WAYS FORWARD: ASSESSMENT

In the two preceding parts we have described the perceived deficiencies of European PIL (see supra 0.) as well as various courses of action that are currently under discussion (see supra 0.). In the following part we assess these courses of action in more detail so as to determine whether they would help to overcome the above-outlined deficiencies. We start with the idea of a comprehensive European Code on PIL (infra 4.) and then move on to discuss the respective merits and demerits of (more) sectoral codifications on the one hand (infra 0.) and codification of general principles on the other (infra 0.).

4.1 Comprehensive Codification

As pointed out earlier (see supra 3.) we understand a comprehensive codification of European PIL as a systematic and comprehensive recording of choice of law and/or international civil procedure. Such a comprehensive codification would have a number of advantages (infra 2.). Most importantly, it would – at least potentially – help to overcome most of the deficiencies detailed earlier. However, a comprehensive codification would also face a number of obstacles that call its desirability and feasibility into question (infra 0.).

Advantages

In 2013 the European Added Value Unit published a report on the economic benefits of having a European Code on PIL (see supra 0.). The report set out to quantify the advantages of having a comprehensive codification and concluded that adoption of a single piece of legislation dealing with PIL would result in an economic surplus of around 140 Million €. Unfortunately, the study suffers from a number of methodological deficiencies. For example, it merely lists potential benefits of a code and does not engage in an analysis of the (drafting and error) costs associated with the adoption of a European Code on PIL. The alleged economic surplus of 140 Million €, therefore, seems to be a rather arbitrary figure.[3] However, this does not mean that a comprehensive Code would not have substantial advantages.

Visibility

The first potential advantage of a comprehensive European Code on PIL would arguably be its visibility.[4] In fact, it is no coincidence that the comprehensive Swiss codification of PIL of 1987 covering choice of law, jurisdiction, and recognition and enforcement served as a blueprint for many countries[5] and influenced, for example, national codifications in Romania,[6] Slovenia,[7] Belgium,[8] Bulgaria,[9] and the Czech Republic.[1] Very frequently,

[1] *Wagner*, in: Leible/Unberath (eds.), Rom 0-Verordnung, 2013, p. 51, 58 et seqq.
[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The EU Justice Agenda for 2020 - Strengthening Trust, Mobility and Growth within the Union, COM(2014) 144 final, at No. 4.2.
[3] MüKo/*von Hein* Art. 3 EGBGB para. 70.
[4] Cf. on this aspect ("Sichtbarkeit") *Kieninger*, in: FS von Hoffmann, 2011, p. 184, 195.
[5] Cf. *Kadner Graziano*, in: von Hein/Rühl (eds.), Kohärenz, 2015 (forthcoming), sub II.
[6] Civil Code as amended by the law of 24 July 2009, Rev. crit. dr. int. pr. 101 (2012) 459.
[7] Law of 8 July 1999, RabelsZ 66 (2002) 748.
[8] Law of 16 July 2004, RabelsZ 70 (2006) 358.
[9] Law of 4 May 2005, RabelsZ 71 (2007) 457.

those domestic codifications not only followed the threefold outer structure of the Swiss code but also adopted the substance of the rules contained therein.

It is very likely that a European Code on PIL would have the potential to trigger similar processes in third states. These would, in turn, induce gradual convergence between EU PIL and the PIL of third states, and thereby foster international harmony of decisions, one of the fundamental goals of PIL. What at first sight might appear as an immaterial, rather political gain could therefore yield practical advantages in the long term. In addition, increased visibility would arguably also be useful in the short term because a comprehensive code would highlight the need to develop union-wide, autonomous general principles of PIL on issues such as characterization or incidental questions, whereas the present scattering of the pertinent rules across various regulations may tempt practitioners to resort to national approaches.[2] This practical utility of a more visible codification of European PIL is closely linked with a second possible advantage, i.e. improving the accessibility of European PIL.

Accessibility

It has often been complained that the multitude of European sources of PIL and their difficult interplay with each other, but also with international conventions and domestic PIL rules (see supra 1.), has turned an already complicated legal field into an area that is very difficult to access for citizens as well as for legal practitioners. In an ironic vein, Jürgen Basedow recently remarked that the EU has planted a lot of PIL trees in the course of the last 15 years, but questioned whether those add up to a forest.[3] And Michael Bogdan observed: "It is difficult to get a general picture of the whole field, in particular for practicing lawyers who are not specialists and for law students who complain that the size and nature of the material make it impossible for them to master the subject within the time frame reserved for it in the curriculum of their law school."[4] Thus, reducing the number of regulations and adopting to a single comprehensive European Code on PIL might help to improve access to the pertaining regulations and, hence, facilitate their application in practice.[5]

On the other hand, creating a single comprehensive code might also have some drawbacks concerning the accessibility of European PIL.[6] Practitioners working in a specific area of law, e.g. judges or lawyers specializing in matters of family and succession law, might prefer to have one or a few sectoral regulations governing the particular field they are actually interested in, such as the Maintenance Regulation as regards maintenance obligations or the Succession Regulation as regards successions.[7] For them, a single piece of legislation would not necessarily improve the accessibility of European PIL because a comprehensive Code would arguably be a lengthy and rather unwieldy piece of legislation.[8] Integrating the content of those regulations into a comprehensive code may ultimately make it more difficult for practitioners to retrieve precisely the information that they are looking for. In addition, a Code would necessarily be subdivided into a general part covering pervasive problems of PIL and various specific parts. This might occasionally even make it more difficult for judges and lawyers to correctly apply rules because in a real-life case, practitioners would have to find out how the general and the specific parts of a comprehensive code fit together. Eventually, a long and complex code might impede access to European PIL for average citizens because it might require considerable efforts to find relevant provisions.

Although a codification of European PIL is thus hardly a panacea to all problems related to the accessibility of this area of law, it is submitted that the counter-arguments just raised must be put into a proper perspective. First of all, one should not over-estimate the degree of specialization that can be observed in legal practice. Even lawyers specializing in divorce law will frequently be in a position to advise their clients on questions of contract law, e.g. the law applicable to a life insurance contract for the benefit of a client's spouse, or the law

[1] Law of 25 January 2012, IPRax 2014, 91.
[2] *Kieninger*, in: FS von Hoffmann, 2011, p. 184, 195.
[3] *Basedow*, RabelsZ 75 (2011) 671.
[4] *Bogdan*, in: Fallon/Lagarde/Poillot-Peruzzetto (eds.), Quelle architecture, 2011, p. 253, 254.
[5] See also the Communicaton from the European Commission, supra fn. 2, COM(2014) 144 final.
[6] *Kieninger*, in: FS von Hoffmann, 2011, p. 184, 196 et seq.
[7] Cf., in the context of a Rome 0 Regulation, *Wagner*, Neth. Int. L. Rev. 61 (2014) 225, 228: "One senses that many practitioners today are happy just to have found the relevant legal instrument among the many existing sources of law."
[8] *Kieninger*, in: FS von Hoffmann, 2011, p. 184, 196 et seq.

applicable to the right to withdraw funds from a joint bank account held by the still married couple, questions which are dealt with not in the Rome III, but in the Rome I Regulation. In regrettable cases of domestic violence, even the Rome II Regulation may come into play.[1] In any event, the current fragmentation of EU PIL by far exceeds any degree of specialization found in legal practice. It suffices to think of the two proposed EU Regulations on the law applicable to the property aspects of marriage and registered partnerships: it is difficult to imagine a family lawyer actually applying only *one* of these instruments. Moreover, a codification of EU PIL would in no way prevent practitioners from focusing merely on those "books" or "chapters" of such a Code they are interested in. Likewise, one has never heard lawyers specialized in substantive divorce law complaining about the fact that a comprehensive civil code also contains rules on contract or tort law. The same is true for average citizens who will probably not mind if they have to consult only one piece of legislation instead of several.

Comprehensiveness

A third potential advantage of a European Code on PIL relates to its – at least potential – comprehensiveness. In fact, as has been pointed earlier (see supra 1.), the essential idea behind a codification is to record a certain area of law in a comprehensive fashion. It follows that a European Code on PIL would be an excellent opportunity to fill existing gaps in current EU legislation (see supra 0.).[2]

Nonetheless, even a European Code on PIL could probably not cover all legal areas in which legislation is desirable. First of all, it must be expected that it will be difficult to obtain a consensus on at least some issues. This holds true, for example, for the law applicable to violations of personality rights, agency and workers' co-determination. Moreover, many Member States are parties to PIL international conventions that the EU must not simply renounce.[3] Numerous Hague Conventions would therefore remain in force even after the adoption of a comprehensive European Code on PIL.

That being said, the existence of international conventions is not *per se* an argument against a codification of PIL. In Switzerland, for example, PIL has been codified even though the Helvetian Confederation is party to a sizeable number of international conventions. The Swiss legislature solved the potential conflict between the national Code and international conventions by way of provisions alerting the user that domestic PIL rules may be superseded by pertinent international conventions (e.g. Art. 1(2), 49, 83, 85 Swiss PIL Code).[4] In a similar fashion, Art. 15 of the EU Maintenance Regulation draws the user's attention to the choice-of-law rules to be found in the Hague Protocol on Maintenance. It follows in view of fields governed by international conventions that pragmatic solutions along the lines of the Swiss Code and the Maintenance Regulation could be also applied in the European context. In contrast, we advise against the approach that the German legislature applied in the reform of the Introductory Act to the Civil Code of 1986, i.e. including a verbatim reproduction of provisions originating in international conventions.[5] Such an approach obscures the supranational origin of the pertinent rules, thereby creating potential obstacles to their uniform application in practice.[6] In addition, not all EU Member States are contracting parties to the same international conventions.

Coherence

Finally, a fourth important advantage of a European Code on PIL would arguably be its potential to overcome the deficiencies that we have earlier described as "redundancies" and "incoherences" (see supra 0. and 0.). In a single Code, redundant or contradicting regulation of general principles (*renvoi*, dual nationality, multi-uni states, etc.) could be avoided, for example, by the introduction of a general part.[7] By the same token, inconsistent regulation of identical issues across several legal fields could be effectively replaced. As regards the law of obligations, for example, the rules on free choice of law could be harmonized (see supra 0.). Finally, a

[1] Cf. *Rodriguez Pineau*, J. Priv. Int. L. 8 (2012) 113.
[2] Cf. *Kieninger*, in: FS von Hoffmann, 2011, p. 184, 194.
[3] *Kieninger*, in: FS von Hoffmann, 2011, p. 184, 189; *Wagner*, Neth. Int. L. Rev. 61 (2014) 225, 232 et seq.; this aspect is neglected by *Czepelak*, Eur. Rev. Priv. L. 2010, 705, 715, 716.
[4] See *Kadner Graziano*, in: von Hein/Rühl (eds.), Kohärenz, 2015 (forthcoming), sub IV.1.
[5] *Wagner,* Neth. Int. L. Rev. 61 (2014) 225, 232 et seq.
[6] *Wagner,* Neth. Int. L. Rev. 61 (2014) 225, 232 et seq.
[7] *Kieninger,* in: FS von Hoffmann, 2011, p. 184, 192.

comprehensive Code could also lead to better integration of choice of law and international civil procedure by way of consistent interpretation of functionally related rules on jurisdiction on the one hand, and choice-of-law rules on the other.[1] If for example both rules on jurisdiction and choice of law in consumer disputes were contained in a single piece of legislation, it would be difficult for the ECJ to avoid a consistent interpretation as it did in its earlier-mentioned *Emrek* judgment (see supra 0.).

Having said that, two caveats are appropriate. The first relates to the introduction of a general part and the consistent regulation of issues across legal fields. While it is true that a Code would allow for a more coherent regulation, European law-makers should not be misled into disregarding the peculiarities of individual legal fields. In fact, a "one-size-fits-all" approach would not be helpful. This is true for example with regard to *renvoi*.[2] Here, the prevailing approaches are pragmatic in nature, distinguishing between legal fields (e.g. the law of obligations on the one hand and family and succession law on the other), connecting factors (e.g. objective connecting factors, alternative connections and party autonomy) and applicable law (e.g. Member States law, laws of third states). It follows that any codification of general principles or general issues should leave room for more refined solutions in individual legal fields.

The second caveat relates to the principle of consistent interpretation. As mentioned earlier (see supra 2.2.3), identical terms should, for the sake of legal certainty, be interpreted in the same way across legal fields, unless their particular function in a specific legal context requires a divergent solution. As rightly pointed out by the ECJ in the *Pantherwerke* decision,[3] there may at times be a reason for interpreting identical terms in different ways depending on the context. In particular, a term may be understood differently depending on whether it is used in choice of law or international civil procedure, for the simple reason that the underlying rationales of these two fields serve different purposes.[4] In particular, a strict parallelism between choice of law rules and jurisdiction is not always desirable because it would undermine the goal of international decisional harmony, i.e. that courts in different Member States should apply the same substantive law to a given case.[5] Finally, a further alignment between the Brussels I*bis* and the Rome I and II Regulations by way of consistent interpretation could have the – arguably adverse – side-effect of creating divergences between Brussels I*bis* and the Lugano Convention of 2007. A European Code on PIL would have to keep these trade-offs in mind.[6]

Obstacles

The above detailed potential advantages of a comprehensive European Code on PIL do not imply that a codification could be achieved easily. On the contrary, a comprehensive codification would inevitably face a number of obstacles.

Institutional obstacles

The main obstacles to a comprehensive codification are institutional in nature. To begin with, there is currently no general legislative competence for a European Code on PIL.[7] The TFEU distinguishes between matters of PIL in general, which are subject to the general legislative procedure (Art. 81(1) and (2)(c) TFEU) and matters relating to family law which are subject to the special procedure laid down in Art. 81(3) TFEU. It should be noted that, according to this classification, succession law is regarded not as belonging to family law, but rather to civil law in general (see Recital 2 of the Succession Regulation). The adoption of a comprehensive European Code on PIL would therefore require compliance with the general legislative procedure as regards, for example, contract, tort as well as succession law, while adherence to the special procedure of Art. 81(3) TFEU would be required as regards family law.[8] Difficulties, however, would arise as far as the general part of a European Code on PIL is

[1] *Meeusen*, in: Liber Amicorum Erauw, 2014, p. 139, 150.
[2] See *von Hein*, in: Leible/Unberath (eds.), Rom 0-Verordnung, p. 341, 363.
[3] ECJ, 16 January 2014, Case C-45/13 *Andreas Kainz v. Pantherwerke AG*, ECLI:EU:C:2014:7, at paras. 23 et seqq.
[4] See, on Recital No. 7 Rome II, *von Hein*, RabelsZ 73 (2009) 461, 470 et seq.
[5] *von Hein*, RabelsZ 73 (2009) 461, 470.
[6] Cf. also *Meeusen,* in: Liber Amicorum Erauw, 2014, p. 139, 153 (reiterating the warning that "the political goal of regional integration must not eclipse the global objectives of private international law").
[7] Cf., in the context of a Rome 0 Regulation, *Wagner*, Neth. Int. L. Rev. 61 (2014) 225, 233–236; see also MüKo/*von Hein* Art. 3 EGBGB para. 73.
[8] Cf., in the context of Rome 0, *Wagner,* Neth. Int. L. Rev. 61 (2014) 225, 233 et seq.

concerned:[1] A single provision on *renvoi* or dual nationality intended to cover, for example, contract and tort law as well as family law would arguably have to comply with both legislative procedures.[2] A theoretical way out of this conundrum could be the *passerelle*-clause in Art. 81(3) subparas. 2 and 3 TFEU, which allows the European legislature to adopt measures in cross-border family matters in the ordinary legislative procedure provided that no national Parliament objects. It is highly unlikely, however, that not a single national parliament would actually exercise its veto right.[3]

The problems inherent in Art. 81 TFEU are exacerbated by the special position of Denmark, the UK and Ireland with regard to judicial cooperation in civil matters,[4] So far, Denmark does not directly participate in measures taken under Art. 81 TFEU,[5] whereas the UK and Ireland participate on a case-by-case basis only.[6] As result, EU Regulations in the field of PIL only apply in Denmark if their scope of application is extended by way of bilateral treaties concluded with the EU. In the UK and Ireland they are applicable only if both Member States decide to opt-in.[7] On account of those special positions, a comprehensive adoption of the acquis has yet to be achieved in all Member States, and as regards Denmark bilateral treaties have been concluded only with regard to the Brussels I and I*bis* Regulation,[8] the Maintenance Regulation[9] and the Service Regulation,[10] but not with regard to the Rome I or II Regulation. In a similar vein, the UK and Ireland have exercised their right to opt-in in a highly selective way,[11] participating in the Rome I and II Regulations, for example, but not in the Succession Regulation. What is more, the UK and Ireland have at times made different choices. Ireland, for example, is party to the EU Maintenance Regulation and the Hague Protocol on the law applicable to maintenance regulation, whereas the UK decided to opt into the EU Maintenance Regulation only.

It needs no emphasis that the special position of Denmark, UK and Ireland and its patchwork-like implications for the acquis would provide a challenge for a single European Code on PIL. Specific parts would have to accommodate the particular positions of Denmark, the UK and Ireland by clarifying that certain "books" or "chapters" of the Code are not applicable to those Member States. Intricate questions, however, would arise as regards the codification of general principles of PIL.[12] These would either have to be phrased in a general fashion, which would infringe upon the special position of Denmark, the UK and Ireland. Alternatively they would have to be phrased in a more nuanced way, accounting for the non-participation of those Member States. The latter approach, however, would significantly impede the accessibility and readability of the Code.

Finally, the Rome III Regulation provides challenges for a comprehensive codification: it is not a conventional regulation but rather a measure of enhanced cooperation pursuant to Art. 20 TEU in conjunction with Art. 326–334 TFEU.[13] As such it is – or, in the case of Greece, will soon be – in force in sixteen Member States.[14] It is doubtful whether those Member States which have so far been reluctant to join Rome III, notably Sweden, the Netherlands or the UK, would be enthusiastic about the prospect of codifying international divorce law in the

[1] Cf., in the context of Rome 0, *Wagner*, Neth. Int. L. Rev. 61 (2014) 225, 234 et seq.
[2] Cf., in the context of Rome 0, *Wagner*, Neth. Int. L. Rev. 61 (2014) 225, 234 et seq.
[3] Cf., in the context of Rome 0, *Wagner*, Neth. Int. L. Rev. 61 (2014) 225, 234.
[4] Cf., in the context of Rome 0, *Wagner*, Neth. Int. L. Rev. 61 (2014) 225, 235 et seq.
[5] Art. 1 of the Protocol no. 22 on the position of Denmark, annexed to the TFEU.
[6] Art. 2, 4 of the Protocol no. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TFEU.
[7] Art. 4 and seq. of the Protocol no. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TFEU.
[8] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2005] OJ L 299/62; Agreement between the EU and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2014] OJ L 240/1.
[9] Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2009] OJ L 149/80.
[10] Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters, [2005] OJ L 300/55.
[11] Cf. Commission Decision of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), [2009] OJ L 10/22; Recital 39 Rome II; Recital 82 Succession Regulation.
[12] Cf., in the context of Rome 0, *Wagner*, Neth. Int. L. Rev. 61 (2014) 225, 235 et seq.
[13] On enhanced cooperation in European PIL, see MüKo/*von Hein* Art. 3 EGBGB paras. 51–54.
[14] Cf. Commission decision of 27 January 2014 confirming the participation of Greece in enhanced cooperation in the area of the law applicable to divorce and legal separation, [2014] OJ L 23/41.

context of a comprehensive Code. The latter aspect leads to the question whether a European code of PIL could itself be passed as a measure of enhanced cooperation.[1] However, according to Art. 327 1st sentence TFEU "[a]ny enhanced cooperation shall respect the competences, rights and obligations of those Member States which do not participate in it". Thus, it is hard to see how matters already governed by the *acquis communautaire* in PIL could be integrated into a comprehensive code without infringing upon the rights and obligations of those Member States which participate in the existing regulations but prefer not to join a comprehensive Code.[2]

In view of the above-mentioned difficulties, the only legislative competence for a comprehensive Code would be Art. 352(1) TFEU. It must be emphasized, however, that the threshold for invoking this provision is rather high. To begin with, a certain legislative action must "prove necessary […] to attain one of the objectives set out in the Treaties". In addition, Art. 352(1) TFEU requires unanimity in the Council. Whether a European Code on PIL would actually meet these thresholds is unclear.

Practical obstacles

In addition to institutional obstacles a comprehensive codification of European PIL would most likely face a number of practical obstacles.

First, most of the regulations on EU PIL are fairly new, which means that experience concerning the application of certain rules and regulations in court practice is frequently still lacking. Solid empirical data are scarce (on the Cost of Non-Europe Report, see supra 0.). From the medium-term perspective, however, more reliable data will certainly become available. In this regard, one should mention the EUPILLAR project funded by the EU Commission[3] The international consortium responsible for this project is led by Prof. Paul Beaumont (University of Aberdeen) and started its work in October 2014. The consortium plans to conduct research and field work employing quantitative research methods. Databases for the cases before national courts as well as for the preliminary references before the ECJ will be compiled for the period since 1 March 2002 (see infra 0.). Furthermore, the consortium will conduct qualitative interviews intended to test participants' attitudes on how the European court system is functioning and how it could be developed in order to foster uniform application of European PIL in practice. Further, the research partners will organise workshops in the targeted countries and a final conference, with a view to involving policy-makers, judges, lawyers and other academics in the project. The proposed research into the litigation patterns in targeted countries is intended to allow the consortium to propose ways to improve the effectiveness of European PIL.

Secondly, it has already been mentioned that many gaps remain in the framework of EU Regulations on PIL, and that it cannot be expected that they will be filled in the near future (see supra 1.). As Giuliano and Lagarde remarked in their report on the Rome Convention of 1980: "To try to unify everything is to attempt too much and would take too long."[4] One has to doubt whether starting work on a comprehensive Code would be conducive to reaching a political consensus on sensitive issues.[5] In those Member States that are not used to having comprehensive Codes on private law – particularly the common law countries, but possibly also some Scandinavian states – the notion of a "code" might provoke resentments rather than enthusiasm (see supra 1.).

Conclusion

A comprehensive codification may solve some (even though not all problems) of European PIL as it currently stands. On balance, significant gains can be expected with regard to the visibility, accessibility and coherence of European PIL (see supra 2.). However, institutional and practical obstacles exist that make it rather unlikely that a European Code on PIL will actually become a reality in the near future (see supra 0.).[6] To be sure, this does not

[1] *Kramer et al.*, A European Framework for PIL, 2012, pp. 90 et seq.

[2] *Kramer et al.*, A European Framework for PIL, 2012, pp. 90 et seq.

[3] "Cross-Border Litigation in Europe: Civil Justice Framework, National Courts and the Court of Justice of the European Union" (JUST/2013/JCIV/AG/4635). One of the co-authors, Jan von Hein, is the consortium member responsible for conducting research in Germany.

[4] *Giuliano/Lagarde*, Explanatory Report to the Rome Convention, [1980] OJ C 282/1, Introduction, sub 2; on the "quasi-inevitable existence of legislative gaps in the European system", see *Meeusen*, in: Liber Amicorum Erauw, 2014, p. 139, 154.

[5] Contra *Czepelak,* Eur. Rev. Priv. L. 2010, 705, 715, 719.

[6] Cf. conclusions by *Kramer,* Current gaps and future perspectives in European PIL, 2012, p. 18; *Kramer et al.*, A European Framework for PIL, 2012, p. 93 and *Kramer,* European PIL: The Way Forward, 2014, pp. 27 et seq.; cf. also *Kieninger*, in: FS von Hoffmann, p. 184, 197.

rule out the possibility of having a single legal instrument on PIL in the long run (see infra 0. on the prospect of a "creeping codification"). Moreover, considering a comprehensive codification of European PIL as a long-term project does not exclude taking measures to improve the coherence of EU PIL in the short- to medium-term. More specifically, it remains possible to further consolidate the *acquis communautaire* in PIL (see infra 0.) and to improve the existing institutional framework (see infra 0.).

4.2 Sectoral Codifications

As pointed out earlier (see supra 0.) an alternative to a comprehensive European Code on PIL is the adoption and/or integration of (more) sectoral codifications limited in their scope to specific areas (e.g. the law of obligations, property law, company law, matrimonial property, names and status of natural persons, etc.). This way forward has essentially the same advantages as a comprehensive codification (see supra 2.), however limited to the specific areas covered: it would increase the visibility of European PIL as regards these specific areas, it would improve these areas' accessibility and their coherence as well. Finally, by filling gaps in the existing legal framework, the adoption of (more) sectoral codifications would also contribute to the comprehensiveness of European PIL. As compared to a comprehensive codification, however, a continued sectoral codification would face less institutional and practical obstacles (see supra 0). In view of legislative competences, aspects of PIL in general and those concerning PIL in family matters could be largely kept separate. Most importantly, the scope of provisions relating to general principles of European PIL could easily be limited to either PIL in general or PIL in family matters. Moreover, the UK and Ireland could decide on a case-by-case basis whether to opt into selected regulations. Finally, it is to be expected that the adoption of further sectoral codifications would provoke less political resistance than a comprehensive codification.

Nevertheless, there are some problems as well if sectoral regulations also encompass rules on international civil procedure, following the example of the Succession and the Insolvency Regulations (see supra 3.2.). Combining Brussels II*bis* and Rome III, for example, would be difficult to realize because of the institutional concerns that have already been discussed (see supra 1.2.1.). Although a better integration of EU regulations on procedural issues – such as Brussels I*bis* – and regulations on choice of law in civil and commercial matters – such as Rome I and II – may contribute to achieving a coherent interpretation of functionally related rules on jurisdiction, on the one hand, and on choice of law, on the other (see supra 0.), one must bear in mind that there are legitimate differences between those two distinct legal areas, and that trade-offs with regard to the relations with third states must be accounted for (see supra 0.). Moreover, codifying functionally similar rules, e.g. on recognition and enforcement of foreign judgments, separately for each legal area may increase the number of redundancies and incoherences already described (see supra 0. and 0.).

On balance, the second way forward would have similar, even though less pronounced advantages as a comprehensive Code. However, it would face less institutional and practical obstacles.

4.3 Codification of General Principles

The third way forward discussed earlier (see supra 0.) consists in the codification of general principles of European PIL (e.g. of choice of law, of international civil procedure or of both), Any such codification would significantly reduce the redundancies found in current EU PIL (see supra 0.).[1] Moreover, it could be used as a tool to eliminate inconsistencies between the various regulations (see supra 0.).

However, any codification of general principles would face the same institutional obstacles that make it difficult to lay down general principles of PIL in a comprehensive code (see supra 1.2.1.).Different legislative competences for PIL in general and PIL in family matters, the special position of Denmark, the UK and Ireland as well as the peculiarities of enhanced cooperation, would make it extremely difficult to find a legal basis for extracting general principles from the existing regulations and to reintegrate them into a separate legal instrument.[2] To be sure, proponents of a Rome 0 Regulation have developed sophisticated models of including static or dynamic references to a Rome 0 Regulation in other legal instruments that would reflect the different

[1] See *Leible/Müller*, YbPIL 14 (2012/13) 137, 142–150; *Wagner*, Neth. Int. L. Rev. 61 (2014) 225, 227 et seq.
[2] *Wagner*, Neth. Int. L. Rev. 61 (2014) 225, 233–236.

position of the Member States concerned.[1] But the compatibility of such proposals with EU primary law is unclear. Moreover, one has to doubt whether the rather complicated result of such an exercise will actually increase the accessibility and coherence of EU PIL. Apart from that, one may be sceptical about whether notoriously controversial questions such as *renvoi* or preliminary questions are actually ripe for regulating them in a general fashion, i.e. outside of their specific context in various regulations.[2]

5. RECOMMENDED WAY FORWARD: A "CREEPING" CODIFICATION

The foregoing considerations show that all current proposals relating to the future of European PIL have both attractions and drawbacks. It follows that there is no easy answer to the question of how to improve the legal framework of European PIL. We therefore propose to combine the options discussed above and strive for what might be termed an incremental process, i.e. a so-called "creeping" codification.[3] To this end we propose a three-pillar-model that will gradually lead to a more coherent framework for PIL at the European level and that might – potentially and in the long run – lead to a comprehensive European Code on PIL.[4] Measures in the first and second pillar focus on legislative actions relating to the substance of PIL whereas measures in the third pillar concern legislative actions designed to improve the overall institutional framework in the field of PIL.

5.1 First Pillar: Completing the Acquis

In the first and arguably most important pillar we recommend measures designed to complete the current acquis. As envisioned by the European Commission in its March 2014 communication, the above (see supra 0.) and elsewhere[5] identified gaps in the current legal framework should be filled. This process should focus on civil and commercial matters, but also include family and succession matters. It should be accompanied by measures of a more general nature relating to the application of PIL by national courts.

Civil and Commercial Matters

In the area of civil and commercial matters, the scope of European rules and regulations is already broad. However, as pointed out earlier (see supra 0.), key aspects that matter in practice, notably agency, property and company law, are still subject to domestic PIL. It is submitted that the priority over the next 5 years should be to extend the scope of existing instruments to cover these aspects as well.

Legislative actions designed to complete the acquis in civil and commercial matters should initially concentrate on filling gaps in existing regulations, notably the Rome I and II Regulations.[6] To begin with, the Rome I Regulation should be amended to include a choice-of-law rule for agency. In addition, the Rome II Regulation should be enriched, if possible, by a choice-of-law rule for violations of personality rights and arguably other special torts, such as prospectus liability. In a second step new regulations focusing on aspects other than obligations should be adopted. High on the agenda should be company law on the one hand and property and trust law on the other.[7] As regards company law, the European Commission has already taken first steps for further unification. In order to fulfill the promises set out in the 2010 action plan to implement the Stockholm Programme[8] – and to implement a European Parliament Resolution of 2012 –,[1] the Commission has released a

[1] *Leible/Müller*, YbPIL 14 (2012/13) 137, 141 et seq.; *Wilke*, GPR 2012, 334, 339 et seq.

[2] Cf., on renvoi, *von Hein,* in: Leible/Unberath (eds.), Rom 0-Verordnung, 2013, p. 341, 394 et seq.

[3] On the origin of this term, cf. *Czepelak,* Eur. Rev. Priv. L. 2010, 705, 715, 718 in fn. 50.

[4] See also *Meeusen*, in: Liber Amicorum Erauw, 2014, p. 139, 144, advocating "the (gradual) establishment of a coherent set of private international law rules".

[5] *Kramer,* Current gaps and future perspectives in European PIL, 2012, at No. 3.1; *Kramer et al.*, A European Framework for PIL, 2012, at No. 1.7; *Kramer,* European PIL: The Way Forward, 2014, at No. 4.2.

[6] *Kramer,* Current gaps and future perspectives in European PIL, 2012, at No. 4.2; *Kramer et al.*, A European Framework for PIL, 2012, at No. 8.3; *Kramer,* European PIL: The Way Forward, 2014, at No. 5.4.2.

[7] *Kramer,* Current gaps and future perspectives in European PIL, 2012, at No. 3.1; *Kramer et al.*, A European Framework for PIL, 2012, at No. 1.7.3; *Kramer,* European PIL: The Way Forward, 2014, at No. 5.4.1.

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the ommittee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, p. 25 (envisioning a Green paper on PIL aspects, including applicable law, relating to companies, associations and other legal persons).

call for tenders relating to a study on the law applicable to companies (see supra 0.). It is to be expected that the study will form the basis for a long envisioned Green paper, which in turn will lay the foundation for a regulation on the law applicable to companies.

Family and Succession Matters

In family and succession matters the situation is more difficult. As outlined elsewhere[2] the gaps are larger and the issues at stake are considerably more controversial, as they are more closely linked to cultural, religious and constitutional differences existing in the Member States. Any legislative action is therefore likely to meet with more opposition than in civil and commercial matters and will have to allow for significantly more discussion to identify common ground. It follows, that more time is needed to complete the acquis here. We submit that a time-frame of at least 5 to 15 years – depending on the legal issues at stake – should be envisioned.

The completion of the acquis in family and succession matters should start with the property aspects of marriages and registered partnerships. Building on two proposals released by the European Commission in 2011,[3] discussions should be intensified to quickly come to a solution. However, since the current distinction between marriage and registered partnerships does not seem to be motivated by substantive differences but rather by the desire to alleviate political concerns,[4] this solution should ideally consist of an integrated regulation on the property consequences of marriages and registered partnerships. To the extent that no agreement can be reached on an integrated regulation or two separate regulations, the adoption of a measure of enhanced cooperation should be considered. This would at least allow for partial harmonization in those Member States that are willing and able to go ahead, whereas all others would be free to follow at a later stage.

As regards other fields of family law – notably formation and validity of marriages and registered partnerships as well as parentage –, legislative actions still need to be initiated. The same holds true for the PIL aspects relating to the name and status of natural persons. As regards these gaps, we suggest commencing discussions that may eventually lead to the adoption of further regulations. These discussions should, where available, build on academic discussions and proposals such as the draft for a European Regulation on the Law Applicable to Names recently submitted by a working group of the Federal Association of German Civil Status Registrars. [5] In contrast, we do not advise taking legislative actions to unify the PIL of adoption and protection of adults. As pointed out earlier (see supra 0.) both aspects are to a large extent covered by two successful Hague Conventions which should not be duplicated on the European level.

General aspects

As becomes clear from the preceding considerations, legislative action in the first pillar should focus on filling substantive gaps existing in the current legal framework. However, legislative action should not stop here as the effectiveness of European PIL depends on its application by judges in national proceedings. Unfortunately, domestic approaches as regards the application of choice-of-law-rules differ widely. Whereas some countries, including Austria and Germany, require courts to determine the applicable law ex officio, thus, leaving no discretion to the judge as regards the application of European choice-of-law rules, others, notably Ireland and the United Kingdom require the parties to plead – and prove – foreign law if they wish to have foreign law applied.[6] It is self-evident that these differences significantly undermine the effectiveness of European PIL in practice.[7]

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[1] European Parliament, Resolution of 14 June 2012 on the future of European company law (2012/2669(RSP).

[2] *Kramer et al.*, A European Framework for PIL, 2012, at No. 1.7.3.

[3] Proposal of 16 March 2011 for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final; Proposal of 16 March 2011 for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 final.

[4] *Bogdan*, in: Fallon/Lagarde/Poillot-Peruzzetto (eds.), Quelle architecture, 2011, p. 253.

[5] Working Group of the Federal Association of German Civil Status Registrars: One Name Throughout Europe – Draft for a European Regulation on the Law Applicable to Names, YbPIL 15 (2013/2014) 31 et seq.

[6] See for a broad comparative overview Institut Suisse de droit comparé, The application of foreign law in civil matters in the EU Member States and its perspectives for the Future, JLS/2009/JCIV/PR005/E4, 2011; *Esplugues Mota/Palao*, in: Basedow/Rühl/Ferrari/de Miguel Asensio (eds.), Eur. Ency. PIL, vol. 1, 2016 (forthcoming); *Gruber/Bach*, YbPIL 11 (2009) 157, 161 et seqq.

[7] *Azcárraga Monzonís*, Int. J. Proc. L. 3 (2013) 105; *Esplugues Mota,* ZZPInt 14 (2009) 201.

We, therefore, endorse ongoing (international and European) efforts to provide for uniform rules relating to the determination and application of foreign law,[1] and suggest that the European legislature take action to clarify the nature of European choice of law. It is submitted that the best and most effective way forward would be the adoption of an EU Regulation dealing with the application and determination of foreign law. This Regulation should make clear that European choice of law is not optional, but rather mandatory in the sense that it has to be applied by national judges.[2] To ease the determination of the content of foreign law as well as its application, the Regulation should also allow for a direct reference procedure between Member State courts (see also infra 0.).

5.2 Second Pillar: Consolidating the Acquis

In the second pillar we recommend legislative measures designed to consolidate the acquis in European PIL. In contrast to measures in the first pillar, they focus on the current rules and regulations in the field and strive for reform and bundling of existing instruments to improve horizontal coherence. It is in line with the European Commission's most recent communication of March 2014 that explicitly calls for consolidation. Just like measures in the first pillar, measures in the second pillar – and essentially for the same reasons – should focus on civil and commercial matters and then gradually move to family and succession law. They can be undertaken at the same time and together with the measures suggested in the first pillar or at a later stage.

Civil and Commercial Matters

When it comes to civil and commercial matters we suggest starting with a review of the two Rome Regulations. As regards both Regulations, the need and the potential for reform and consolidation seems the most obvious, in that they deal with obligations and are interconnected in many ways (see Recitals 7, 17, 24 Rome I Regulation, Recital 7 Rome II Regulation). In addition they have been in place for a while, which means that sufficient empirical data about their working in practice is available.

A review of the Rome I and II Regulation may take two different forms. First, each Regulation may be reviewed separately taking into consideration the concepts applied by the other Regulation. This is the current approach as expressed, inter alia, in the above mentioned Recitals. Second, both Regulations could be reviewed with the aim of adopting a single Rome Regulation covering the entire private international law of obligations. This single Rome Regulation could or could not contain a general part as envisioned by those authors who favor the adoption of a separate Rome 0 Regulation. In this study we propose to follow the second option and to strive for adoption of a single Rome Regulation covering both the PIL of contractual and non-contractual obligations including a general part.[3] The current distinction between contractual and non-contractual obligations may be traced back to historical contingencies rather than to substantive reasons. In fact, the discussions preceding the adoption of the Rome Convention in 1980, the predecessor of the Rome I Regulation, envisioned a joined instrument for contractual and non-contractual obligations. A first draft convention submitted in 1972 expressly covered the PIL of contractual and non-contractual obligations.[4] After accession of the UK and Ireland, however, non-contractual obligations were excluded from the scope of the later adopted Rome Convention in order to facilitate negotiations.[5] Since both the UK and Ireland have opted into the Rome II Regulation (see supra 1.2.1.), concerns about the political feasibility of a joined instrument have become moot.

As regards the merits of a joined instrument we believe that both the integration of the two Rome Regulations and the adoption of a general part, even if limited to the law of obligations, would have a number of advantages. First, the integration of the Rome I and II Regulation would be an opportunity to eliminate the above described incoherences (see supra 0.), notably as regards a party choice of law and as regards the protection of weaker parties. Second, the adoption of a general part would effectively avoid the redundancies discussed earlier (see supra 0.) and thereby promote transparency. Third, in conjunction with the gap-filling

[1] See, for example, *Esplugues Mota*, YbPIL 13 (2011) 273.
[2] *Sonnenberger*, in: FS Kropholler, 2008, p. 227, 245; *von Hein*, RabelsZ 73 (2009) 461, 507.
[3] MüKo/*von Hein* Art. 3 EGBGB paras. 69 et seqq.
[4] Kommission der Europäischen Gemeinschaften, Vorentwurf eines Übereinkommens über das auf vertragliche und außervertragliche Schuldverhältnisse anwendbare Recht, RabelsZ 38 (1974) 211–219.
[5] Cf. *Giuliano/Lagarde*, Explanatory Report to the Rome Convention, [1980] OJ C 282/1, Introduction, sub 5.

measures of the first pillar, notably relating to agency and violations of personality rights, the adoption of an integrated Rome Regulation would amount to a near to complete framework for the PIL of obligations.

In the long run adoption of an integrated Rome Regulation would – at least – potentially lay the foundation for further integration in civil and commercial matters. Most importantly, it could be the foundation for a comprehensive choice-of-law instrument in civil and commercial matters covering the law of obligations as well as company law and property law – a comprehensive Rome Regulation. In addition, it could serve as the basis for the integration of choice of law and international civil procedure, covering issues of jurisdiction, recognition and enforcement and, as the case may be, special European procedures as embodied in the Small Claims Regulation, the Uncontested Claims Regulation and the Payment Order Regulation. The final step could arguably be a single regulation for choice of law and international civil procedure, which in turn could be the first building block of a comprehensive European Code on PIL.

Family and Succession Matters

As regards family and succession matters the acquis is far less broad and dense than in civil and commercial matters. Legislative measures will therefore necessarily have to focus first on the completion of the acquis as described earlier (see supra 0.). However, this does not mean that there is no room for consolidation and integration of the existing instruments. On the contrary as discussed earlier, redundancies and incoherences are omnipresent (see supra 0. and 0.). Legislative measures should therefore aim at overcoming these incoherences and redundancies by, for example, adopting general rules for dual nationalities and incidental questions. These rules could be integrated into each of the existing Regulations. Or they could be integrated into a general part of a more comprehensive regulation, as suggested earlier in the context of civil and commercial matters (see supra 0.). However, in contrast to the two Rome Regulations that can fairly easily be integrated, the structure of the regulations currently in force in family and succession matters does not allow for an easy step-by-step integration. This is because the Rome III Regulation and the Brussels II*bis* Regulation are limited to choice of law and international civil procedure respectively, whereas the Maintenance and the Succession Regulation cover aspects of choice of law as well as jurisdiction, recognition and enforcement. Thus any attempts to decrease redundancies and to increase coherence would necessarily involve significantly more efforts than in civil and commercial matters.

Nonetheless, we argue that in the interest of transparency and coherence, these additional efforts will be justified. We, therefore, propose following the same approach as in civil and commercial matters in the field of family law as well. An integration of the Rome III and the Brussels II*bis* Regulation into a single Regulation on the PIL of divorce, however, would be difficult to realize in the short term in view of the institutional concerns with regard to enhanced cooperation (see supra 1.2.1.). Nevertheless, the potential future instruments on property aspects of marriages and registered partnerships might be more amenable to an integrated codification. In the long run, other future regulations on matters such as the formation and validity of marriages and registered partnerships, parentage, name and status of natural persons should be consolidated into a comprehensive regulation on family relationships and status issues, which in turn could effectively be the second building block of a European Code on PIL.

5.3 Third Pillar: Improving the Institutional Framework

As indicated earlier (see supra 0.), we believe in the effectiveness of legislative action relating to the substance of PIL suggested in the first and second pillar. However, these measures will arguably be insufficient, unless accompanied by measures designed to improve the overall institutional framework. The third pillar suggested here contains a number of such measures.

An Acquis Group for EU Private International Law

Both on the European and on the national level, law-making in PIL has benefited considerably from the input of independent academic advisory bodies, such as the European Group of Private International Law (GEDIP) and the German Council for Private International Law.[1] Both bodies provide extremely valuable advice on legislative

[1] On GEDIP, see *Hartley*, in: Fallon/Kinsch/Kohler (eds.), Le DIP européen en construction, 2011, p. 9; *Lagarde*, ibid., p. 13; on the German Council, see *Wagner*, IPRax 2004, 1 et seqq.

matters in the field of PIL and have made numerous influential reform proposals (see supra 0.). These proposals will be particularly useful in the context of the first pillar suggested here, i.e. completing the acquis by filling the gaps that can be found in the current framework.

The second pillar, i.e. consolidating the acquis, however, will require a more permanent organizational structure on the European level. First of all, a close analysis of the structural features of already existing regulations, identifying and avoiding redundancies as well as eliminating incoherences between existing rules is paramount. To this end, a thorough and continuous analysis of the actual application of European PIL in the court practice of the Member States will prove to be indispensable to uncover frictions arising between the various regulations. If similar problems are solved differently in various regulations, such an analysis will help in defining best practice and to give recommendations with regard to a consolidated legislation. Such recommendations must be based on solid empirical data.

Secondly, we are fully aware of the fact that evaluation reports prepared by the European Commission on various regulations and the EUPILLAR project already mentioned (see supra 1.2.2.1.) are important steps in this direction that we greatly appreciate. Yet, given the growing number of EU Regulations and the expanding circle of now 28 Member States, it is submitted that the arduous task of monitoring this complex field of law in an enlarging area and on a continuously updated basis cannot be fulfilled adequately by expert meetings that take place only once or twice a year, nor by ad-hoc reports or by research projects that run only for a limited period of time. Instead, a more permanent monitoring structure is appropriate, which we would like to term an "Acquis Group for EU Private International Law". As this group is not envisaged as replacing, but merely complementing the work of already existing advisory bodies and research projects, membership in such bodies and projects, on the one hand, and the Acquis group proposed here, on the other, should naturally not be considered as mutually exclusive.

The task of this group would consist both in evaluating the acquis communautaire in European PIL from a holistic, normative perspective and in monitoring its practical application in the Member States. The group should consist of academic experts from all participating Member States and also include high level practitioners (judges, lawyers, notaries). The Acquis Group should be endowed with the necessary resources to carry out state-of-the-art empirical and statistical research.

The Acquis Group should in the short term start to report on the current state of European PIL to the Parliament on a bi-annual basis. From a medium term perspective, the Acquis group should elaborate a restatement of guiding principles and best practice in European PIL that could pave the way for a consolidated framework.[1]

Special Courts and Chambers for Private International Law

The second measure we propose relates to the judiciary and envisages more specialization in the adjudication of PIL. It entails a number of suggestions of which the most important one is the establishment of a special court for PIL at the CJEU.

Specialization at the European level

According to Art. 257 TFEU the "European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialized courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas". Nevertheless, apart from a few distinct areas (e.g. Community trademarks or plant varieties, civil service issues), no specialized courts have been established thus far. This finding comes as a surprise especially when looking to European PIL: given the ever growing number of rules and regulations, their growing complexity and interconnectedness, it is widely acknowledged that the field has developed into a highly specialized matter that can best be mastered by experts. We therefore endorse the idea of creating a specialized court for PIL in accordance with Art. 257 TFEU.[2] It would ease the CJEU's work, expedite proceedings, improve the quality of judgments and ensure coherence in European PIL in the long term. Alternatively – or in the short term – one could consider endowing the

[1] On the idea of a restatement of European PIL, cf. *MacEleavy Fiorini*, in: Fallon/Lagarde/Poillot-Peruzzetto (eds.), Quelle architecture, 2011, p. 27, 35 et seq.; see also the discussion report by *Kohler*, IPRax 2011, 419 et seq.

[2] See *Rösler*, 2012, pp. 420 et seq.

General Court with jurisdiction for preliminary references in the area of European PIL in accordance with Art. 256(3) TFEU, and (informally) establishing special chambers for PIL within the General Court.[1] However, having a specialized court for European PIL attached to the General Court would arguably enhance the visibility of the field and highlight its importance for the European Union as an area of freedom, security and justice.

We are, of course, aware that the implementation of such a proposal would require a major European court reform and would fundamentally change the way the CJEU as a whole and the Court of Justice in particular work. Opponents will certainly argue that specialization may endanger the coherence of European law as such, i.e. as between European PIL and other fields of European law. However, in the light of the changes that PIL has seen in recent years and is likely to see in the coming years, coupled with the likely increase of the caseload before the ECJ, we believe that the expected benefits of specialization outweigh the potential costs. It simply seems plausible that a specialized chamber will deliver more elaborate, better-reasoned and more coherent judgments in less time than a general chamber without any specialization. This is, of course, not to question the professional qualification of the ECJ judges. But in a world of time constraints even polymaths might find it challenging to deal with a diverse array of complicated legal questions without the slightest specialization. The recent *Emrek* judgment might serve as a cautionary example that judgments may fail to convince both in result and reasoning (see supra 2.2.3.).

At the Member State Level

In addition to the specialization efforts on the European level, we also argue for more specialization at the level of Member States, for example through concentration of PIL cases in specialized courts or – at least – specialized chambers. Some Member States, including Germany, have experimented with such a concentration and generally gained positive experience,[2] particularly in the field of international adoptions and measures concerning the protection of children and vulnerable adults.[3] It should be noted, however, that it is not exactly clear how far concentration of court competences is compatible with EU regulations, such as the Maintenance Regulation and the Payment Order Regulation that provide for international jurisdiction and venue at the same time. The ECJ has recently had the opportunity to answer this question in the context of the Maintenance Regulation.[4] The Court stressed that "centralisation of jurisdiction […] promotes the development of specific expertise, of such a kind as to improve the effectiveness of recovery of maintenance claims, while ensuring the proper administration of justice and serving the interests of the parties to the dispute."[5] The Court, however, declined to endow the Member States with unlimited discretion in this regard. It rather decided that "Article 3(b) of Regulation No 4/2009 must be interpreted as precluding national legislation such as that at issue in the main proceedings which establishes a centralisation of judicial jurisdiction in matters relating to cross-border maintenance obligations in favour of a first instance court which has jurisdiction for the seat of the appeal court, except where that rule helps to achieve the objective of a proper administration of justice and protects the interests of maintenance creditors while promoting the effective recovery of such claims, which is, however, a matter for the referring courts to verify."[6] We believe that concentration of international cases will constitute a major step forward that will allow national judges to gain specific knowledge and more experience in the application of European PIL. It will improve the quality of judgments and simultaneously ensure that only problematic cases ultimately reach the ECJ. For reasons of legal security, however, the question whether such a concentration is compatible with EU law should not be left to the discretion of lower regional courts in the Member States. Thus the European legislature should consider modifying the regulations accordingly.

European Database for Private International Law

A third measure we propose is meant to ease the work of Member States' courts and lawyers. It pays tribute to the fact that it is national courts and lawyers who apply the rules of European PIL in practice. To ensure that

[1] *Rösler*, 2012, pp. 420 et seq.
[2] See *Siehr*, Am. J. Comp. L. 25 (1977) 663; on more recent developments, see MüKo/*von Hein* Art. 3 EGBGB paras. 313 et seq., with further references.
[3] MüKo/*von Hein* Art. 3 EGBGB para. 314.
[4] ECJ, 18 December 2014, Case C–400/12 and C-408/13 *Sanders v. Verhaegen* and *Huber v. Huber*, ECLI:EU:C:2014:2461.
[5] ECJ, Case C–400/12 and C-408/13 (fn. 4), at para. 45.
[6] ECJ, Case C–400/12 and C-408/13 (fn. 4), at para. 47.

courts and lawyers have easy access to relevant information and to secure that European PIL is applied in a uniform way throughout Europe we strongly endorse the work of the EUPILLAR consortium designed to create a European database for PIL containing references to ECJ and national case law.

As mentioned earlier (see supra 1.2.2.1.) the EUPILLAR consortium will, inter alia, compile a quantitative database containing cases, involving European PIL before national courts as well as requests for preliminary rulings of the ECJ since 1 March 2002. The quantitative database will provide information about national courts and their decisions concerning rules of European PIL, notably the Brussels I/I*bis*, Brussels II*bis*, Rome I, Rome II Regulations as well as the Maintenance Regulation. Judgments involving the application of these regulations will be analyzed in terms of the date, the parties to the litigation, the subject matter of the proceedings, the ECJ case law cited by the national court and other supplementary aspects. It is also of interest whether the court requested a preliminary ruling pursuant to Art 267 TFEU. In addition to the quantitative database, a qualitative database will be developed that will include information about the experiences of legal practitioners, in order to identify the important issues of PIL which appear in their everyday work.

Preliminary References between Member State Courts

A fourth proposal that we would like to endorse with the aim to improve the overall institutional framework in the field of PIL relates to the application of foreign law. As noted earlier (see supra 0.), we support ongoing efforts to clarify the (mandatory or default) nature of European choice of law. To facilitate the determination and application of foreign law that might frequently be the result of PIL, the additional suggestion is to establish a preliminary reference procedure between Member States' courts.[1] This procedure would – as with the preliminary reference procedure to the ECJ – allow Member States to directly address higher courts in other Member States and refer questions as regards the interpretation of that state's national law. It would complement the already existing (mostly diplomatic) ways of ascertaining the content of foreign law, notably in the framework of the London Foreign Law Convention of 1968,[2] by establishing a direct link to the very court that knows the applicable law better than any other institution.

Better legal education and better training of judges

A last measure finally relates to the fundamental and pervasive issue of legal training and education. A recent study shows that – despite more than 50 years of European integration – there is still a broad lack of knowledge of European law and European procedures.[3] As regards European PIL, this lack of knowledge is likely to impair any legislative efforts to improve the framework for PIL. And, naturally, improving access to cases and foreign law – as envisioned by our above outlined proposals – will be of no avail if judges and practitioners are unaware of European PIL and the conditions of its application.

We, therefore, propose expanding the European Judicial Training Network and the Academy of European Law in order to properly educate and train judges, especially in the field of European PIL, in accordance with Art. 81(2)(h) TFEU. In addition, we suggest considering a more coherent approach to legal education and legal training across European Member States as such. In fact, we believe that European PIL should play a much more prominent role in the education of future lawyers and judges.

[1] *Remien*, in: Basedow et al., 75 Jahre MPI, 2001, p. 617; on a similar model in Australia (New South Wales), cf. *Spigelman*, L. Q. Rev. 127 (2011) 208.

[2] European Convention on Information on Foreign Law, London, 7 July 1968.

[3] Academy of European Law (ERA), Judicial training in the European Union Member States", European Parliament, Policy Department C, Brussels 2011, available at
http://www.europarl.europa.eu/RegData/ etudes/etudes/join/2011/453198/IPOL-JURI_ET%282011%29453198_EN.pdf.

6. CONCLUSION AND SUMMARY

During the last 15 or so years, European law-makers have adopted an impressive number of Regulations dealing with various aspects of PIL (see supra 1.). Unfortunately, these Regulations do not yet add up to a comprehensive, concise and coherent body of law. Instead, the ensemble of European PIL is characterized by gaps (see supra 0.), redundancies (0.), and incoherences (supra 0.). European institutions, notably the European Commission and the European Parliament, have therefore called for a discussion on the future development of European PIL. More specifically they have raised the question whether the above-outlined problems could be solved with the help of a European Code on Private International Law.

In the preceding study we have sought to illuminate this and related questions. Most importantly, we have analyzed the various courses of action currently under discussion that range from a comprehensive codification of PIL (see supra 3.), to merely sectoral codifications (see supra 0.), and to the codification of general principles (supra 0.). We have argued that each of these courses of action has a number of advantages (see supra 0.). A comprehensive codification, for example, would significantly improve the visibility, accessibility and coherence of European PIL (see supra 2.). However, institutional and practical obstacles relating, among others, to the competences of the European legislature and the special position of Denmark, the UK and Ireland as regards judicial cooperation in civil matters, make it unlikely that a European Code on PIL could be realized in the near future. The same holds true, albeit to a lesser degree, for a codification of general principles of European PIL (see supra 0. und 0.). In contrast, the adoption of (more) sectoral codifications limited to specific legal areas of PIL seems both feasible and desirable.

Against this background we propose postponing measures for the adoption of a comprehensive codification or a codification of general principles of European PIL at this point. Rather, we suggest following a three-pillar-model that will gradually lead to an improved legal and institutional framework for European PIL (see supra 0.). The first pillar of the suggested model contains measures designed to successively complete the current body of law with the help of sectoral codifications (see supra 5.). The second and the third pillars, by contrast, feature measures that are meant to consolidate the current legal framework on the one hand (see supra 0.) and to improve the institutional framework of the pertaining rules and regulations on the other (see supra 0.). Measures in the second pillar comprise for example the review and integration of existing legal instruments in civil and commercial matters and in family and succession matters. Finally, measures in the third pillar range from the foundation of an Acquis Group for Private International Law (see infra 0.), to more specialization of courts at the EU and at the Member States level (see infra 0.), to the introduction of a preliminary reference procedure between Member States' Courts (see supra 0.), to the creation of a European database for cases relating to PIL (see supra 0.) and, finally, more targeted legal education and training of judges (see supra 0.). If implemented, the suggested measures will gradually lead to an improved legal and institutional framework for European PIL, which may pave the way for a comprehensive European Code on PIL in the long term.

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Biography

Jan von Hein is a professor at the University of Freiburg, Germany, where he holds a chair in German, Comparative and Private International Law and serves as a Director of the Institute for Comparative and Private International Law, Department III. Before that, he was a professor at the University of Trier from October 2007 to March 2013, a senior research fellow at the Max-Planck-Institute for Comparative and Private International Law (Hamburg; 1998–2007), and a Joseph Story Research Fellow at Harvard Law School (1997–98). Von Hein holds both German state examinations and a Ph.D. as well as a Habilitation in Law from the University of Hamburg. Since 2009, he is a member of the German Council for Private International Law, a select group of law professors acting as advisors to the Federal Ministry of Justice; since 2014, he chairs the Council's 2nd Commission, dealing with matters of international commercial law. Von Hein received the 1998 Otto-Hahn-Medal for outstanding scientific achievements from the Max-Planck-Society for his doctoral dissertation and he was awarded the 2008 research prize of the Deutsches Aktieninstitut for a monograph on the reception of U.S. corporate law in Germany. The latter book was also honoured as one of the legal books of the year by two leading German periodicals, the Neue Juristische Wochenschrift (NJW) and the Juristenzeitung (JZ). Von Hein is the volume editor of one of the leading commentaries on German private international law, the Münchener Kommentar zum Bürgerlichen Gesetzbuch (vols. 10 and 11, 6th ed. 2015), as well as the author of a standard commentary on the Brussels I-Regulation (Kropholler/von Hein, Europäisches Zivilprozessrecht, 9th ed. 2011). Apart from that, he has published numerous law review articles, mainly on private international law, international civil litigation and comparative corporate law.

Giesela Rühl is a Professor of Private International Law, International Civil Procedure, European Private Law and Comparative Law at the University of Jena, Germany. Before coming to Jena she held research positions at the Humboldt-University in Berlin, the Max Planck Institute for Comparative and International Private Law in Hamburg, the European University Institute in Florence and the Harvard Law School. She is the author of a monograph on Private International Law and Economic Theory (Statut und Effizienz, Mohr Siebeck 2011) and a co-editor of the 4-volume European Encyclopedia of Private International Law (Edward Elgar, forthcoming 2016). She is an elected member of the German National Young Academy of Arts and Sciences, a fellow of the European Law Institute and an associate member of the International Academy of Comparative Law.

Session I - Less paper work for mobile citizens

Promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents within and outside the European Union
(Proposal for a Regulation, COM(2013) 208)

Pierre Callé

Based on the notion that there may be a discrepancy between the right to the free movement of citizens within the European Union and the reality with which they may be confronted when attempting to exercise this right, the purpose of this study is to investigate whether or not the proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 will be able to deal with the existing problems.

TABLE DES MATIÈRES

LIST OF ABBREVIATIONS

Proposal for a Regulation	Proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (COM(2013) 208)
The Hague Apostille Convention	The Hague Convention of 5 October 1961 abolishing the requirement of legalisation for foreign public documents

EXECUTIVE SUMMARY

The proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 is structured around three areas: the abolition of the legalisation of certain public documents; the simplification of the use of copies and translations of public documents and the development of multilingual forms.

The proposed abolition of all legalisation or certification between Member States for the public documents defined in Article 3 of the draft Regulation is probably the major benefit of the text. Currently, there are indeed numerous texts that abolish all legalisation, but none that offers a global solution, both with regard to the documents targeted and to the countries listed by the texts. This fragmented legal framework creates complications for European Union citizens and businesses. The global approach initiated by the proposal for a Regulation (albeit limited to public documents as defined in Article 3) shall constitute a significant simplification. Moreover, the mechanisms to combat fraud appear to be at least as effective as those in existence currently.

The simplification of the use of copies and translations of public documents also seems capable making it simpler to exercise the right to free movement. However, the obligation to use a sworn translator would be worthy of debate.

Lastly, the development of multilingual forms would appear to be an area to explore so as to abolish or reduce translation requirements.

INTRODUCTION

Based on the notion that there may be a discrepancy between the right to the free movement of citizens within the European Union and the reality with which they may be confronted when attempting to exercise this right, the purpose of this study is to investigate whether or not the proposal for a Regulation on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012 will be able to deal with the existing problems.

As a preliminary point, it should be pointed out that the right to free movement within the European Union, i.e. the right to come and go between countries, for shorter or longer periods, for whatever reason, is probably the right with which citizens of the European Union associate most closely[1]. Reducing the administrative formalities required to produce a public document in another Member State doubtlessly guarantees the right to free movement and thereby helps to create a citizens' Europe and a well-functioning single market. The aim of the proposal is not to standardise the content of public documents, but to facilitate their acceptance in other Member States.

The proposal is focussed on three areas: the abolition of the legalisation of certain public documents; the simplification of the use of copies and translations of public documents and the development of multilingual forms.

[1] Opinion of the European Economic and Social Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012', Rapporteur: Vincent FARRUGIA, CES4005-2013.

1. THE ABOLITION OF THE LEGALISATION OF CERTAIN PUBLIC DOCUMENTS

1.1. Definition of legalisation and the Apostille

Legalisation can be defined as the formality intended to certify the authenticity of a signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears[1]. Although legalisation appears essential in the international system, this is because, in a given legal system, if a document attests its origin, it is because it is presented using a form and formulae that are known and easily controllable. However, these external signs of authenticity clearly differ from one State to another. Due to its appearance, a foreign document alone may not be sufficient to convince someone of its authenticity, as it will be essentially unknown to the local authorities who have never seen similar documents. Where it is necessary to verify that a foreign public authority has received a document or recorded an act authentically, the bare minimum is to verify the capacity of the foreign authority that signed the document.

In the traditional sense, legalisation consists of a series of individual authentications of the document. The process, which involves State embassies or consulates, or ministries for foreign affairs, can be relatively long.

To simplify the traditional legalisation process, the Hague Convention of 5 October 1961, to which the States of the European Union (EU) are party, abolishes the requirement of legalisation for foreign public documents, replacing it with a more simple formality, the Apostille. The Apostille is affixed to the document itself and must conform to the model appended to the Convention. The Apostille is issued by the competent authorities of the country in which the document is issued, and there is no requirement to involve the authorities of the country in which the document must be presented. This Convention of 5 October 1961 is one of the most ratified conventions in the world (104 States at present). Therefore, the following are exempt from legalisation and instead use the Apostille in the contracting States: a) documents emanating from an authority or an official connected with State courts or tribunals, including those emanating from a public prosecutor, a clerk of the court or a judicial officer ('huissier de justice'); b) administrative documents; c) notarial acts; d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentications of signatures. In contrast, the Convention does not apply to: a) documents executed by diplomatic agents or consular officers; b) administrative documents directly involved with a commercial or customs operation.

Although it does simplify the authentication process, for European Union citizens the Apostille process represents a certain loss of time and a certain cost, which varies enormously from one Member State to another, ranging from being free of charge to a fee of up to EUR 50 per document.

In this manner, European Union citizens who go to live in another Member State must prove the authenticity of the public documents from their Member State of origin. Thus, to receive a certain social service, they may be required to produce a birth certificate. To access certain professions, they may be required to produce an extract from the judicial record. This constitutes an obstacle to exercising the right to free movement. The total cost of obtaining an Apostille for use within the territory of another Member State for European Union citizens and businesses is estimated at EUR 25 million, which would be added to the cost of the legalisation procedure, where this remains in place, which itself is estimated to cost between EUR 2.3 million and EUR 4.6 million In addition to this is the cost to Member States of issuing the Apostilles (EUR 5 million to EUR 7 million)[2].

[1] This is the definition used most frequently by international conventions: Article 3 of the Brussels Convention abolishing the Legalisation of Documents in the Member States of the European Communities concluded on 25 May 1987, or Article 1 of the Convention of 7 June 1968 on the Abolition of the Legalisation of Documents executed by Diplomatic Agents or Consular Officers, or Article 1 of the ICCS Convention on the exemption from legalisation of certain records and documents signed at Athens on 15 September 1977.

[2] Opinion of the European Economic and Social Committee, *op. cit*. footnote 1.

The proposal for a Regulation is intended to abolish legalisation, together with any similar procedure, for the production of a public document issued in one Member State in another Member State. The expression 'similar formality' unquestionably refers to the affixing of the Apostille, as established in the Hague Apostille Convention[1].
La Haye[2].

1.2. Existing texts abolishing all formalities

European Union texts

It should be pointed out immediately that the abolition of legalisation between European Union Member States is already under way, in particular concerning judgments and authentic instruments. Article 56 of Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) states that 'no legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55(2), or in respect of a document appointing a representative *ad litem*' The same applies with regard to the Brussels I Bis Regulation, Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 61 of which states: 'No legalisation or other similar formality shall be required for documents issued in a Member State in the context of this Regulation.'

There is a similar rule in Article 52[3] of Regulation No 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Bis Regulation), or in Article 65[4] of Regulation No 4/2009 of the Council of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

Legalisation will no longer exist following the entry into force, on 17 August 2012, of Regulation No 650/2012 of the European Parliament and of the Council of 4 July 2012 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[5].

In other words, when dealing with the material application of a European Regulation (civil and commercial issues, matrimonial and parental responsibility issues, maintenance, succession), no legalisation formality is required for moving judgments and authentic instruments from one Member State to another.

In addition to this initial provision of the European Union texts, certain Member States have signed the Brussels Convention abolishing the Legalisation of Documents in the Member States of the European Communities concluded on 25 May 1987. This Convention is not in force, however it is being applied provisionally by the States that have chosen to do so, namely Belgium, Denmark, Estonia, France, Ireland, Italy and Latvia[6]. This Convention abolishes all legalisation for public documents that, having been executed within the territory of a contracting State, must be produced within the territory of another contracting State or before the diplomatic agents or consular officers of another contracting State, even where such agents are performing their functions within the territory of a State that is not a party to the Convention.

Thus, the following are exempt from all legalisation in relations between the States that are parties to the Brussels Convention of 25 May 1987: a) documents emanating from an authority or an official connected with

[1] Article 3(5) of the proposal.
[2] Art. 3, § 5, de la proposition.
[3] No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 37, 38 and 45 or in respect of a document appointing a representative ad litem.
[4] No legalisation or other similar formality shall be required in the context of this Regulation.
[5] Article 74: No legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of this Regulation.
[6] Cyprus has ratified the Convention, but has not accepted provisional application.

State courts or tribunals, including those emanating from a public prosecutor, a clerk of the court or a judicial officer ('huissier de justice'); b) administrative documents; c) notarial acts; d) official certificates which are placed on documents signed by persons in their private capacity, such as official certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentications of signatures.

The Convention also applies to documents executed by the diplomatic agents or consular officers of a contracting State, acting in their official capacity, performing their functions within the territory of any State, where such documents must be produced within the territory of another contracting State or before the diplomatic agents or consular officers of another contracting State, performing their functions within the territory of a State that is not a party to the Convention.

Texts from non-European Union sources

There are also non-European Union texts, to which Member States may be party, that result in the abolition of all legalisation or certification.

Thus, all Member States conclude bilateral conventions on this issue with various States.

There is also a certain number of multilateral conventions that can be cited. Some of these texts target public documents in a broad sense; others concern particular types of documents, such as civil status records or documents issued by diplomatic agents or consular officers.

Thus, a Convention of the Council of Europe on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers, concluded in London on 7 June 1968 abolishes legalisation for documents executed by diplomatic agents or consular officers[1].

Likewise, several conventions negotiated by the International Commission on Civil Status (ICCS) abolish legalisation between the States that have ratified them:

- ICCS Convention No 2 signed in Luxembourg on 26 September 1957 on the issue free of charge and the exemption from legalisation of copies of civil status records[2],
- ICCS Convention No 16 signed in Vienna on 8 September 1976 on the issue of multilingual extracts from civil status records[3] and,
- ICCS Convention No 17 signed in Athens on 15 September 1977 on the exemption from legalisation of certain records and documents[4].

These ICCS Conventions are not signed and ratified by all of the European Union States, meaning that whether or not they are applicable depends on the country in which the document was executed and the country in which it must be produced. ICCS Convention No 2 has been ratified by Austria, Germany, Belgium, France, Italy, Luxembourg, the Netherlands, Portugal, Switzerland and Turkey. For its part, ICCS Convention No 16 has been ratified by Germany, Austria, Belgium, Bosnia-Herzegovina, Croatia, Spain, France, Italy, Luxembourg,

[1] Article 3: 'Each Contracting Party shall exempt from legalisation documents to which this Convention applies'.

[2] Article 4 of Convention No 2: 'Verbatim copies of or extracts from civil status records, bearing the signature and seal of the issuing authority, shall be exempted from legalisation in the respective territories of the Contracting States'. Article 5: 'For the purposes of Articles 1, 3 and 4, the expression "civil status records" means: - records of births, - records of still-births, - records of acknowledgements of natural children, made or transcribed by civil registrars, - records of marriages, - records of deaths, - records of divorces or transcriptions of divorce decrees or judgments, - transcriptions of court orders, decrees or judgments in matters relating to civil status'.

[3] Article 8 of Convention No 16: ICCS Convention No 16 is to be replaced by ICCS Convention No 34 on the issue of multilingual and coded extracts from civil-status records and multilingual and coded civil-status certificates signed in Strasbourg on 14 March 2014, Article 5 of which also provides for exemption from legalisation.

[4] Article 2 of Convention No 17: 'Each Contracting State shall accept without legalisation or equivalent formality, provided that they are dated and bear the signature and, where appropriate, the seal or stamp of the authority of another Contracting State which issued them: 1. Records and documents relating to the civil status, capacity or family situation of national persons or their nationality, domicile or residence, regardless of their intended use, 2. All other records or documents if they are produced with a view to the celebration of a marriage or the establishment of a civil status record'.

Macedonia, the Netherlands, Portugal, Slovenia, Switzerland and Turkey. As for ICCS Convention No 17, it binds Austria, Spain, France, Greece, Italy, Luxembourg, the Netherlands, Portugal and Turkey.

Interim conclusion

Il résulte de cet ensemble législatif une certaine complexité et un certain désordre. Le droit de l'Union européenne est partiel et morcellé. Les nombreuses conventions internationales n'offrent aucune solution globale et sont ratifiées par un nombre varié et limité de pays. Ce cadre juridique fragmenté crée une complexité pour les citoyens et entreprises de l'Union européenne. La suppression de la légalisation reste partielle, puisqu'elle n'existe que dans le champ d'application des différents règlements ou conventions mentionnées.

Notamment, pour que toute procédure de légalisation soit supprimée, il convient tout à la fois que l'Etat dont émane l'acte et l'Etat dans lequel il doit être produit soit parti à un texte dispensant de toute légalisation. Il appartient donc aux citoyens de l'Union européenne de vérifier 1° qu'un texte dispensant de toute légalisation vise l'acte qu'ils entendent produire et 2° que ce texte est applicable dans l'Etat d'origine de l'acte et dans l'Etat dans lequel il doit être produit.

Ainsi un acte de naissance établi en France sera dispensé de légalisation et d'apostille s'il est produit en Italie (Convention CIEC n°2), s'il est produit en Irlande (Convention de Bruxelles), s'il est produit en Grèce (Convention CIEC n° 17), mais non s'il est produit en Pologne ou en Finlande (apostille).

1.3. Assessment of the proposal for a Regulation

The proposal is to spread the abolition of legalisation among the Member States of the European Union. It should be emphasised that, pursuant to Article 2 of the proposal, this acceptance of public documents in the Members States 'does not apply to the recognition of the content of public documents issued by the authorities of other Member States'. The proposal targets only the acceptance of public documents, not the recognition of their effects.

The proposal seems to constitute a major step forward in promoting the movement of public documents within the European Union and, therefore, in making life easier for Europeans who live in a different State of the European Union. It shall constitute a very significant simplification. Even a relatively simple formality, such as the formality for the Apostille where the Hague Apostille Convention is applicable, constitutes a hindrance to exercising the right to free movement. Thus, Article 4 of the proposal provides for the abolition of all legalisation or similar formality (Apostille) for public documents, as defined in Article 3. This abolition of all formalities will facilitate the presentation of public documents in another Member State than the one in which they were issued. Thus, it will make life easier for European citizens who live in another State of the European Union than their State of birth and who are regularly required to produce records of birth, records of marriage and extracts from the judicial record so as to obtain a right or access to a social service or to comply with a fiscal obligation, etc. It will also make life easier for businesses that wish to trade in another Member State, and that are required to produce various public documents to this end: articles of association, fixed assets owned, etc. Thus, the proposal will reduce the costs, even though they are already low, associated with obtaining an Apostille or legalisation. Above all, it will make it possible to save time in the production of public documents.

The following would henceforth be exempt from any formalities: 'documents issued by authorities of a Member State and having formal evidentiary value relating to: a) birth; b) death; c) name; d) marriage and registered partnership; e) parenthood; f) adoption; g) residence; h) citizenship and nationality; i) real estate; j) legal status and representation of a company or other undertaking; k) intellectual property rights; l) absence of a criminal record'.

The risk associated with the abolition of legalisation would be the risk of seeing an increase in forged public documents within the European Union. This risk does not appear genuine, for two reasons. Firstly, an overview of the current situation shows that the abolition of legalisation between Member States of the European Union has already been deemed possible, without an increase in forged documents circulating within the European Union. Secondly, there are significant doubts about whether or not the Apostille actually ensures that the fight against fraud is effective. Indeed, the Hague Apostille Convention specified that the Apostilles were subject to numbering and public registration. In other words, if forged Apostilles are easy to create, they should also be easy to detect. The register or card index containing the details of the Apostilles is an essential tool in the fight

against fraud, as it makes it possible to confirm the origin of an Apostille. If the recipient of an Apostille desires to check its origin, he must contact the authority that issued the Apostille and that will verify whether the entries on the Apostille correspond to those in the register or card index (Article 7). Unfortunately, in practice, few people check the Apostille on documents presented to them, meaning that inspections are virtually non-existent. In addition, the Hague Conference seeks to develop an e-Apostille/e-register programme, with the support of the EU[1], to facilitate the inspection of Apostilles issued, in particular. Furthermore, the inspection of Apostilles by consulting the registers does not, in any way, make it possible to detect civil status documents issued by the appropriate authorities but bearing false information, obtained through the corruption of local authorities.

In this respect, the proposal for a Regulation, while abolishing all formalities including the Apostille, will probably make it possible to better detect forged public documents circulating in the European Union than at present. Indeed, the proposed Article 7 provides for administrative cooperation in the event of reasonable doubts over the authenticity of a document, namely the authenticity of the signature it bears, the capacity in which the signatory of the document acted and the name of the authority which has affixed the seal or stamp. Therefore, the authorities of a Member State are entitled to send an information request to the competent authorities of the Member State in which the documents were issued, either by using the Internal Market Information System (IMI) instituted by Regulation No 1024/2012, a software application that can be accessed online, or by contacting the central authority of their Member State. Each information request shall be accompanied by an explanation of the facts of the case and a scanned copy of the document. In order to not cause a hindrance to the right to free movement within the European Union, this verification should be fast. It is also established that a response must be provided as quickly as possible and within a maximum of one month. The objective of the fight against fraud that the administrative formalities are there to achieve is, probably, better achieved by the proposed system than by the current system, which is mainly based on the consultation of the Apostille register which is non-existent in practice.

In this respect, the proposal for a Regulation improves administrative cooperation between Member States, based on the Internal Market Information System. In particular, it is stated that the Internal Market Information System will be used as a directory of templates of public documents from each State. Member States shall also appoint at least one central authority that will be responsible for providing assistance in relation to information requests.

However, the proposal of the Commission which, as the author has already emphasised, constitutes a commendable advance for facilitating the right to free movement within the European Union, does raise two lamentable issues.

The first relates to the area of material application of the proposal, i.e. to the list of public documents targeted by the abolition of legalisation. For us, it would have been preferable to target all public documents of every type, in particular judgments or authentic instruments (marriage contracts or deeds of sale, for example), as the latter shall be exempt from legalisation only if they enter into the area of material application of a European Regulation. At present, this area of material application for the Regulations remains partial. However, there is no rational explanation as to why a notarised document or a judgment handed down in matters of succession should be exempt from all legalisation (due to entering into the area of application of Regulation No 650/2012 of 4 July 2012, applicable from 17 August 2015), when a judgment handed down in matters relating to matrimonial regimes will not be exempt. In this respect, the principle of the abolition of all legalisation formalities, regardless of the public document, would have a greater benefit of simplification.

The second lamentable issue concerns the dovetailing with the other European Regulations that exempt judgments and authentic instruments that enter into their area of application from all legalisation procedures. These Regulations have not established any procedure that would enable an authority in a Member State, which may have reasonable doubts over the authenticity of a legal decision or an authentic instrument, to verify this authenticity. Also, the procedure proposed by the Commission in Article 7 – either by using the Internal Market Information System (IMI) established by Regulation No 1024/2012, or by contacting the central authority of their Member State – could be extended to documents exempt from legalisation by virtue of

1 See the pages dedicated to the Apostille on the website of the Hague Conference on Private Law, http://www.hcch.net/index_en.php?act=text.display&tid=37

another European Regulation. The Internal Market Information System, used in particular for the exchange of information between authorities in the field of professional qualifications, would appear to constitute a suitable electronic method for developing cooperation between authorities for the acceptance of public documents[1].

2. THE SIMPLIFICATION OF THE USE OF COPIES AND TRANSLATIONS OF PUBLIC DOCUMENTS SIMPLIFICATION DE L'UTILISATION DES COPIES ET TRADUCTIONS DES DOCUMENTS PUBLICS

The second aim of the proposal for a Regulation is to simplify the production of copies or translations of public documents.

According to Article 5 of the proposal:
'1. Authorities shall not require parallel presentation of the original of a public document and of its certified copy issued by the authorities of other Member States.
2. Where the original of a public document issued by the authorities of one Member State is presented together with its copy, the authorities of the other Member States shall accept such copy without certification.
3. Authorities shall accept certified copies which were issued in other Member States'.

This Article contains three rules: Firstly, a ban on requiring a certified copy where the original of a public document is presented; secondly, the obligation to accept a non-certified copy if presented together with the original of the document, and thirdly, the obligation to accept certified copies issued in another Member State. These three rules almost appear to be common sense. What is the point of requiring a certified copy if the original is produced? Why refuse a non-certified copy if the original is produced at the same time, enabling the accuracy of the copy to be verified? Why reject a copy that the authorities of another Member State have certified as accurate? It is almost shocking that these principles were not already applied in all Member States.

The proposal for a Regulation also aims to facilitate non-certified translations. Thus, Article 6 states: 'Authorities shall accept non-certified translations of public documents issued by the authorities of other Member States'. This establishes compulsory acceptance of translations provided, even non-certified translations. To ensure the accuracy of the translation, it states 'where an authority has reasonable doubt as to the correctness or quality of the translation of a public document presented to it in an individual case, it may require a certified translation of that public document. In such a case, the authority shall accept certified translations established in other Member States'.

There are various comments to be made concerning this provision.

Firstly, the verification mechanism is based on the existence of any doubts that the authority may have regarding the correctness or quality of the translation. Specifically, such doubts will exist where the translation is of mediocre quality. In contrast, there is a risk that incorrect translations may not be detected. Therefore, the obligation to use a sworn translator would appear to constitute a guarantee against fraud. It certainly represents a cost and an additional obstacle for European Union citizens. The European Economic and Social Committee estimated the cost of certified translation of one page to be EUR 30. The total cost for European Union citizens and businesses of the requirement for certified translations is estimated at between EUR 100 million and EUR 200 million. However, a certified translation provides the guarantees that the use of non-sworn translators would not provide with regard to the accuracy of the translation.

[1] As highlighted by the Green Paper 'Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records' (COM (2010) 747), the 'ICCS Platform' could constitute a very useful instrument for the future. The Platform could be used by a State for exchanges between national authorities and thereby provide the authorities with the option of issuing documents and exchanging civil status data electronically. On this point, see ICCS Convention No 33, signed in Rome on 19 September 2012, on the use of the International Commission on Civil Status Platform for the international communication of civil-status data by electronic means.

Secondly, within the European Union, there is already legislation that prohibits Member States from requiring the production of a document in its original form, a certified copy or a certified translation, such as Directive 2006/123/EC on services in the internal market. However, the approach remains sector-specific. The advantage of the proposal for a Regulation is to standardise what certain European texts have established in individual situations.

3. LE DÉVELOPPEMENT DES FORMULAIRES MULTILINGUES

The third aspect of the proposal for a Regulation involves the creation of multilingual forms concerning birth, death, marriage, registered partnership and legal status and representation of a company[1]. These forms are provided in Annexes I to V of the proposal. Electronic versions of these multilingual forms will also be created[2]. This proposal is based on the provisions of ICCS Convention No 16 of 8 September 1976 on the issue of multilingual extracts from civil service records that provides for multilingual forms for extracts from civil service records concerning birth, marriage or death. This Convention is to be replaced by ICCS Convention No 34 on the issue of multilingual and coded extracts from civil-status records and multilingual and coded civil-status certificates signed in Strasbourg on 14 March 2014[3].

These multilingual forms will be a solution to replace the existing public documents of each Member State and shall be issued on request to citizens and companies entitled to receive the equivalent public documents existing in the issuing Member State[4]. The question of which authorities will issue the forms falls under the national law of each Member State. It is simply provided that that they must be issued under the same conditions, cost in particular, as the equivalent public document existing in the Member State. Obviously, the use of multilingual forms will not be compulsory and shall not prevent the use of the equivalent public documents issued by the public authorities of each Member State. These multilingual forms shall have the same official probative value as the equivalent public documents.

The aim of this proposal is not to facilitate the movement of public documents issued in each Member State. European public documents are hereby created, able to replace the public documents of each Member State.

The creation of forms for the European Union able to replace equivalent internal documents is not completely new. The European Certificate of Succession, created by Regulation No 650/2012 of 4 July 2012, was created for this same purpose. It does not replace the equivalent internal documents of each Member State, but, when used, it is able to replace them. These forms are the start of a material standardisation of public documents, at least as regards their form.

The first question raised concerns the usefulness of these multilingual forms. After all, if the movement of internal legal documents is ensured, at first glance, there does not seem to be much use in developing European documents. For example, a European birth certification does not seem necessary if the easy circulation of the birth certificates issued by each State is ensured. In truth, European documents are superior to the internal documents of each State. Because they all use the same form, the issue of their translation is facilitated, or even rendered unnecessary. This is the primary benefit of these multilingual forms. However, this benefit should not be underestimated. Translation represents both a significant cost for European citizens, in addition to consuming time. Therefore, multilingual forms make it possible to save time and money in the translation process. Reducing the time and cost of translation also helps to fully guarantee the right to free movement of citizens and businesses within the European Union.

However, reducing translation costs is not the sole benefit of these multilingual forms. Currently, the details on civil status documents differ greatly from one Member State to another. Thus, an authority in a Member State may face a document containing details that are not used in its legal system, which could lead to requests for further information. The same applies to instances where the form of the documents is markedly different. The

[1] Article 11.
[2] Article 14.
[3] Article 5.
[4] Article 12(1) and (2).

creation of a European document resolves such comprehension issues as it standardises the form and details on the document.

For example, a couple, one of whom is French while the other is German, live in Germany with their child, who was born in France. To receive any social security services, the parents may need to produce the child's birth certificate. Rather than issuing a French birth certificate, which would require translation and the form and details of which may differ to those of German birth certificates, the parents could request that the French registrar issue a European certificate for presentation to the German authorities. As the forms would be multilingual, it would be possible to request that one be issued directly in the language of the country in which production is required, in the example at hand, in German.

The only issue is that, to ensure that these forms meet citizens' requirements in the long term, they should be updated periodically, as provided for in Article 15 of ICCS Convention No 34.

CONCLUSION

In conclusion, the proposal seems to facilitate the production of a public document in another Member State, without sacrificing the guarantee of authenticity of public documents. It thereby helps to strengthen legal security within the European Union and to make it easier to exercise the right to free movement, without damaging trust in public documents issued in other Member States.

Session I - Less paper work for mobile citizens

Promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU and beyond

Michael P. Clancy

Upon request by the JURI Committee, this study provides an analysis of the proposal for a regulation of the European Parliament and the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU and amending Regulation (EU) No. 1024/2012. It considers the development of the law of free movement of documents in Europe, the Treaty and legal basis for the proposal and considers how this contributes to the development of the internal market.

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LIST OF ABBREVIATIONS

IMI	Internal Market Information system
UNCITRAL	United Nations Commission on International Trade Law

EXECUTIVE SUMMARY

This paper is about the Commission proposal (COM(2013) 228) on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and beyond. It is intended to accompany a session of the Legal Affairs Committee of the EP and its "Civil Law and Justice Forum" on 26 February 2015 entitled 'Less paperwork for mobile citizens'.

As with most proposals for legal change, it is important to consider the historical and contemporary context so that change can be seen in the light of past and present experience.

The proposal is an important one for completion of the single market. For people and businesses the free movement of documents throughout Europe will be of significant assistance and enable individuals to move, settle, gain employment and integrate themselves into society in all member states.

Certain aspects of the proposal will also be of assistance to businesses. The proposal will help citizens to meet Member States' and help in meeting member states requirements for confirmation of nationality and citizenship and entitlement to legal protection.

It is appropriate that the broad range of public documents proposed originally has been limited to personal status documents in the latest discussions. Starting with personal status documents is the correct approach. This will enable the system to be established and to be monitored closely. It will enable adequate research to be undertaken as to the effectiveness of the proposal and to identify any difficulties in its implementation. The proposal contains provisions for review at the end of three years and at that point the results of any research conducted into the implementation process can be examined. Decisions can then be taken about any modifications which may be needed to make the proposal more effective and efficient.

Other aspects of the completion of the single market should be brought into view in order to make sure that this proposal is not frustrated by anti-competitive practices or other barriers. It is also essential that the proposal is seen in the context of the development of the e-justice agenda in many Member States and the proposals by President Juncker for the creation of a single digital market.

It is important that there is full integration between this proposal and these digital developments.

1. INTRODUCTION TO FREE MOVEMENT OF DOCUMENTS IN EUROPE

Seen from the perspective of Common Law Jurisdictions, free movement of documents in Europe is not a new phenomenon. It is illustrative to consider how important free movement of documents was to the development of earlier systems of supra national law in Europe. I have chosen two systems, the canon law and the law merchant as examples to illustrate how important free movement was in early European legal development and how these systems relied on the ability to transfer documents across borders. In each example the interests of individuals and businesses were served by flexible systems which allowed legal status to be proved and legal obligations to be met through recognition of authentic documents.

1.1 Civil law and Canon Law usage

Canon law and through that body of law, Civil (or Roman) law had a significant impact on the development of much personal law in England, Scotland and Ireland. The maxim 'Ecclesia vivit jure Romano' – the church lives by the Roman law, meant that civil law concepts such as bona fides and institutions such as notaries, found their way into legal systems through the operation of the canon law. The wide jurisdiction operated under canon law permeated legal arrangements across Europe and the British Isles. Canon law was the first truly supra-national law. When discussing the development of the ecclesiastical control of consistorial or family jurisdiction, some commentators have placed that jurisdiction firmly within the ambit of the Church within Italy and France by the 10th century[1]. In the Byzantine Empire the Bulle d'Or of Alexus Comnenus I granted to bishops the cognizance of matrimonial causes in 1086[2]. The general failure of royal secular power or the inability of the secular arm to exercise power explain to a great extent why the church was able to assume this jurisdiction.

As it was on the continent of Europe, so it was in Scotland, the Scottish monarchy of the early medieval period was, with some notable exceptions notoriously weak. The significant medieval text, Regiam Majestatem which allowed bishops to inquire into marriage, was probably a great relief to the king who allowed this act to pass into law[3]. A competent authority, one which was learned and independent would be able to take over a difficult task. From this point the Canon law began its far reaching influence upon the law of Scotland and through which the roman law or roman-civil law found its way and firmly became the received system of Scotland.

Church jurisdiction then included all matters involving the cura anima in which faith and morals were concerned, all matters involving oaths which included many contracts, all matters of status i.e. marriage, legitimacy, wills, succession, marriage gifts and all matters of a criminal nature involving the ecclesiastical estate[4].

In some matters, both canon and civil law entwined. For example, where in a case concerning the devolution of property, a marriage required to be certified, the king would be able to command a bishop to make inquiry into the marriage and to notify the king or his justiciars (judges) of the result. In 1215 the fourth Lateran Council decreed that any bishop who was overburdened by the weight of episcopal duty could appoint an ecclesiastic to assist him.[5] From this power to delegate the figure of the bishop's official or commissary emerged. These judges were invariably legally qualified and many in Scotland had taken their degrees in Paris, Orleans or Bologna or other universities where both civil and canon law were taught[6].

However, it was in appellate jurisdiction to the courts in Rome that European status documents were most freely exchanged in this period.

[1] Esmein, Le Mariage en Droit Canonique pp 20 - 28
[2] Fourth Lateran Council (1215) Constitution 9
[3] Regiam Majestatem (Stair Society) Ch2
[4] Regiam Majestatem (Stair Society) Ch50
[5] Fourth Lateran Council (1215) Constitution 9
[6] DER Watt 'Scottish Masters and Students at Paris in the 14th Century' (1955) 36 Aberdeen University Review

Particularly in relation to matrimonial cases, both the Sacra Romana Rota and the Sacra Penitentiaria Romana heard cases from all over Europe[1]. Protocol books of Scottish notaries display much of the documentation relating to stages of procedure in the sacred penitentiary[2]. These documents were either written in Scotland and presented in Rome or written in Rome and presented in Scotland. Elaborate requirements for authenticity included employing up to four notaries to sign a document and institutional seals.

The formulare book of St Andrews contains at least one process sealed with the seal of the penitentiary[3]. Matrimonial dispensations to marry constituted a large number of these cases, legitimacy cases also featured.

During the 15th and 16th centuries the expense of many actions at the courts in Rome was beginning to worry the secular authorities. Complaints of 'Ingentes Laborares et expensas prodigias' (works and expenses) were referred to in Parliament in Scotland from as early as 1415.

In 1493, Parliament advised the King's subjects who were conducting litigations in Rome to return home to Scotland and to submit their processes in the Scottish courts[4]. The Formulare Notarium Rotae gives a tariff of standard charges and lists the charge per item used in the Curia e.g. for the register or process of an ordinary cause consisting of 12 folios the charge was one ducat. For a citation with an inhibition by edict for a defender outwith the Curia one ducat. For the noting of a definitive sentence in the first instance five ducats. There was an exchange rate table attached to this formulary, the usual Scots Pound was equivalent to one ducat whereas an English Pound fetched six ducats[5]. Letters of appointments of lawyers in the court in Rome are a clear indication of powers of attorney being used across Europe. In 1546, Queen Mary, the Queen Regent using powers of attorney appointed no less than four advocates before the consistary[6].

The Council of Trent, in its 24th session held on 11 November 1563 required the parish priest to keep a register of marriages giving the names of the persons married, the witnesses and the day on which and place where the marriage was contracted and also required the parish priest to register the names of those who are baptised[7]. This early database of personal status documents was therefore a requirement throughout those countries in Europe where the decrees of the Council of Trent maintained validity following the Reformation.

In non-Catholic countries, following the Reformation for example in Scotland, the records of births and/or baptisms, proclamations of banns and/or marriages and deaths and/or burials were kept by individual parishes before introduction of civil registration in 1855[8]. The parish minister or the session clerk usually assumed responsibility for record keeping but there was no standard format employed. In England and Wales, contrary to the situation in Scotland, statutory recording of births, marriages and deaths only commenced in 1837[9]. Prior to that, parish registers of baptisms, marriages and burials were kept by local parish churches[10].

The current Scottish law on basic public status documents is contained in the Registration of Births, Deaths and Marriages (Scotland) Act 1965[11] and the Marriages Act 1977[12]. Registration of births and deaths is governed by the Births and Deaths Registration Act 1953 for England and Wales[13] and the Marriage Act 1949 covers the registration of marriages in that jurisdiction.[14]

[1] J.J. Robertson, Canon Law as a source, Stair Tercentenary Studies (Stair Society, 1981)
[2] Protocol book of Cuthbert Simon, Scottish Record Society
[3] St Andrews Formulare (Stair Society) No. 100
[4] Acts of the Parliaments of Scotland (APS) 1493 c7
[5] Formularium Notarium Rotue (Glasgow University spec coll) fo.267
[6] Registrum secreti sigilli regum Scotorum pg 244
[7] Council of Trent (1563) Session 24
[8] Registration of Births, Deaths and Marriages (Scotland) Act 1854 (17 & 18 Vict. C.80)
[9] Births and Deaths Registration Act 1837 (7 Will.4 & 1 Vict. C.22)
[10] www.nationalarchives.gov.uk
[11] Registration of Births, Deaths and Marriages (Scotland) Act 1965 c49
[12] Marriage (Scotland) Act 1977 c.15
[13] Births and Deaths Registration Act 1953 c.20
[14] Marriage Act 1949 c.76

1.2. The Law Merchant

The Law Merchant or lex mercatoria was the legal system created by merchants in the Middle Ages which regulated trade and commerce throughout Europe, North Africa and Asia Minor[1].

The Law Merchant was essentially a customary law which applied to commercial matters and merchants trading at Fairs and in Ports in medieval times[2]. It emphasised the independence of Merchants and their rules governing commercial matters from the Civil law and the law of emerging states[3]. It was in substance a form of supra-national but polycentric law. Gerard Malynes, the seventeenth century author of Consuetudo vel Lex Mercatoria (1622), stated that 'it is a customary law, approved by the authority of all Kingdoms and Commonwealths and not a law established by the sovereignty of any Prince"[4]. There were many expressions of merchant law in the law of the sea. For example the laws of Oleron, the Sea Laws of Wisby, the Consulado del Mar and the Sea Laws of William Welwood[5].

Recent scholarship has emphasised that the Law Merchant was very much an equitable law which, in dealing with disputes between merchants was flexible in procedure, quick and cost effective. Flexible justice could be obtained at the Merchant courts in many cities including Marseilles and Genoa[6].

There was little procedural formality and relaxed methods of proof and documentation - there was no need for notarial execution of documents to transfer debt nor to prove agency or contractual exchange[7]. In *Customary Law, Credibility, Contracting and Credit in the High Middle Ages,* Bruce Benson[8] identifies the underpinning values of the lex mercatoria through credible promises, repeated dealing, information networks and reputation. The development of a sophisticated system of European trade was made possible by applying these values in a real and practical way. Evidence of these arrangements comes from the records of the Mahgribi traders who deposited their contracts, price lists, letters between traders accounts and other documents in the geniza (storeroom) of the Ben Ezra Synagogue in Fustat or Old Cairo[9]. Further evidence of non-simultaneous inter-group trade, credit and contracting comes from the Genoa and Marseilles notary records concerning the Champagne Fairs[10]. These fairs were amongst the most significant in medieval Europe. They were strictly regulated in terms of locality, type of merchandise traded, when trading could take place and how accounting should happen[11]. Benson records that "French, German, English or Flemish merchants from Northern Europe" sold cloth to buy spices, dyes or leather from Southern European merchants by accepting a 'promissory note' or letter of credit as payment or accepted the promise to pay later made by a merchant. In the same way merchants from Genoa, Asti, Piacenza, Lucca, Florence and other cities in the South sold spices, dyes or leather had to buy the northern cloth before they sold their goods, so they provided promissory notes or letters of credit to buy cloth[12]. The notes were negotiable throughout Europe. Trading on credit was the norm before the end of the Middle Ages[13].

The law of agency was also highly developed and applied in relation to commerce at the great fairs of Europe. Accordingly merchants could appoint agents to look after their affairs in distant towns - this could involve entering into negotiations and transporting goods across Europe[14].

Alongside these developments a practical method of dispute resolution developed. Arbitrators were able to decide cases relating to rental of horses or as we would know them freight charges. Merchants also established

[1] From the Medieval Law Merchant to E-Merchant Law, L. Trakman, University of Toronto Law Journal, Vol. LIII, Number 3

[2] Trakman op cit.

[3] Trakman op cit

[4] Trakman op cit, G Mayles. Consuetodo vel Lex Mercatoria or the Ancient Law Merchant, London 1622

[5] William Welwood, Abridgement of all Sea Lawes (1613)

[6] Customary Commercial Law, Credibility, Contracting and Credit in the High Middle Ages, Bruce L Benson, Austrian Law and Economics, Peter Boettke and Todd Zywickieds (Elgar Publishing, London forthcoming).

[7] Trakman, op. cit

[8] Benson, op. cit, 12

[9] Benson, op. cit, 13

[10] Benson, op. cit, 19

[11] Benson, op. cit, 19

[12] Benson, op. cit, 20

[13] Benson, op, cit, 20

[14] Benson, op. cit, 22

courts to dispense justice at Fairs. These were known as the courts of Piepoudre or Pie Powder[1]. They operated different rules from those which applied in courts of common law. This meant that the merchant courts did not require documents such as letters of advice, policies of assurance, assignments of debt, bills of exchange and lading to be sealed or delivered as a precondition of being pled in court[2].

This demonstrates that commercial law in early Europe found ways to internationalise itself and that it operated without reliance on the formalities which the common law or the jus commune required.

Modern commercial law and practice mirrors to a great extent the ancient law merchant. Commercial courts are subject to special procedures designed to provide speedy and cost-effective justice. International arbitration under the UNCITRAL Model Law or local laws substantially influenced by the Model Law (such as the Arbitration (Scotland) Act 2010), provide a framework for dispute resolution[3].

International banking operates within a regulated system. Corporate entities function (subject to national laws and other regulatory frameworks) on a worldwide basis which determines location, activity, administrative function, ownership, tax status and employment regime with reference to the needs of shareholders and commercial success.

1.3. Proof of foreign public documents in private international law

The current general law in Scotland is that under Scottish common law, extracts or exemplifications of the decrees of a foreign court are admissible in evidence in Scotland if they are receivable in evidence per se under the rules of the issuing court[4]. When such extracts or exemplifications are receivable in that court, they will be receivable in Scotland[5]. However, because Scottish courts are unfamiliar with foreign rules relating to authenticity, the authenticity must be certified as genuine. This can be done by either a notary public, the signature of a British Consul or the Mayor of the town where the document was signed[6].

There is no recent law on the point but it is likely that similar principles apply to the admission of foreign public documents other than court decrees including extracts from public registers and from notarial protocol books.

UK courts do not require the legalisation of foreign court, decrees, notarial acts or other public documents. The Convention Abolishing the Requirement of Legalisation for Foreign and Public Documents (concluded on 5 October 1961) known also as "the Apostille Convention" defined "legalisation" as "the formality by which the diplomatic or consular agents of the country in which the document has to be produced, certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears"[7].

The Apostille Convention replaced the expensive and problematic formalities of full legalisation by the issue of an Apostille Certificate[8]. The citizens of states party to the Apostille Convention use the Convention where they produce domestic public documents in another state party which for its part requires authentication of the document concerned.

The Apostille Convention applies only to public documents which are listed in Article 1[9] of the Convention:

[1] Benson, op. cit, 28

[2] Benson, op. cit, 29

[3] Arbitration (Scotland) Act 2010 asp1

[4] Dixon, on Evidence para. 1319; Sinclair v Fraser (1771) 2 Pat.App.253; Deli and London Bank v Loch (1895) 22R.849; see also Anton's Private International Law 3rd Edition (2011), Paul Beaumont, Peter McEleavy (W Green) paragraph 27.99

[5] Anton, 27.99

[6] Anton, 27.99

[7] Anton 27.101

[8] Hague Convention of 5 October 1961 abolishing the requirement of legalisation for foreign and public documents, Article 2.

[9] Hague Convention Article 1

a) Documents emanating from an authority or an official connected with the courts of tribunals of the state, including those emanating from a public prosecutor, a clerk of a court or a process server.
b) Administrative documents
c) Notarial acts
d) Official certificates which are placed on documents, signed by persons in their private capacity such as official certificates recording the registration of a document or the fact that it was in existence on a certain date and official and notarial authentications of signatures.

It is noticeable that this definition is very similar to the definition of 'public documents' contained in the orientation guidelines which the Council Presidency issued on 24 November 2014.[1]

The Hague Conference on Private International Law states in its outline on the Apostille Convention that apostille's are mainly issued in practice in connection with public documents such as birth, marriage and death certificates, extracts from commercial registers and other registers, patents, court rulings, notarial acts and notarial attestations of signatures and academic diplomas issued by public institutions. Apostilles can also be used for certified copies of public documents[2]. Only competent authorities designated by each contracting state to the Convention can issue an apostille.

The apostille is issued at the request of a person who has signed the document or of any bearer of the document[3]. When properly completed, the apostille certifies the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears[4]. The Convention has been ratified by the United Kingdom but no implementing legislation has been introduced. Foreign public documents certified as authentic in terms of the Convention would, however, likely to be regarded as authentic by the Scottish or English courts.

The Oaths and Evidence (Overseas Authorities and Countries) Act 1963 provides an order making power which ensures that official copies of entries in certain public registers, to which the Order applies, may be received in Scotland as evidence that the registers contain such entries without further proof. This Act has been applied to Belgium, France, Denmark, Ireland, Italy, the Netherlands, Germany and Luxembourg. Changes in this area will clearly come if the new regulation becomes law.[5]

1.4. Existing EU law and policy statements on administrative co-operation

EU Regulation No. 1024/2012[6] which came into effect on 14 November 2012 built on a number of previous decisions and communications including the Commission decision of 12 December 2007[7]. The Commission decision of 2 October 2009 (2009/739/EC)[8] set out the arrangements for exchange of information by electronic means between Member States under Directive 2006/123/EC[9] on services in the internal market. The Commission communication of 21 February 2011 entitled "Better governance of the single market through greater administrative co-operation: a strategy for expanding and developing the internal market information system ("IMI")" and the Commission communication dated 13 April 2011 entitled "The Single Market Act: 12 levers to boost growth and strengthen confidence – working together to create new growth"[10] are also relevant for understanding the policy context.

[1] Orientation guidelines 24 November 2014 available at http://data.consilium.europa.eu/doc/document/ST-15843-2014-INIT/en/pdf
[2] www.hcch.net/index_en.php?act=text.display&tid=37
[3] Hague Convention, Article 5
[4] Hague Convention, Article 5
[5] The 1963 Act and relevant Orders
[6] Regulation (EU) No. 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative co-operation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ("the IMI Regulation"), OJ L 316, 14.11.2012, p. 1–11
[7] 2008/49/EC concerning the implementation of the Internal Market Information system (IMI) as regards the protection of personal data
[8] Commission decision 2009/739/EC: of 2 October 2009 setting out the practical arrangements for the exchange of information by electronic means between Member States under Chapter VI of Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market, OJ L 263, 7.10.2009, p. 32–34.
[9] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market "the Services Directive", OJ L 376, 27.12.2006, p. 36–68
[10] Regulation EU No. 1024/2012 recital (5)

Regulation 1024/2012 sets out the practical arrangements which were perceived to be needed to enable Member States to co-operate more effectively and exchange information with one another and with the Commission in an effort to apply EU legislation governing the free movement of goods, persons, services and capital[1]. The regulation established IMI formally and set out rules for its use including the processing of personal data between competent authorities of Member States and between competent authorities of the member states and the Commission[2]. IMI's focus on administrative co-operation is driven by the need to implement EU acts in the field of the internal market within the meaning of Article 26(2) of the Treaty on the functioning of the European Union (TFEU)[3]. The specific EU legislation affected by Regulation 1024/2012 is listed in the annex to the regulation, including Directive 2006/123/EC on services in the internal market, Directive 2005/36/EC on the recognition of professional qualifications, Directive 2011/24/EU on the application of patients' rights and cross border health care, Regulation (EU) No. 1214/2011 on the professional cross-border transport of Euro-cash by road between Euro area Member States and Commission Recommendation of 7 December 2001 on principles for using SOLVIT, the internal market problem solving network.

Chapter I sets out the General Provisions including the establishment of IMI, the scope of its use and the possibility, prospectively realised by the Proposal, of expansion.

Article 4 permits pilot projects to ascertain if IMI would be an effective tool to create more administrative co-operation. The proposal for the free movement of documents fits well with this intention.

Chapter II deals with functions and responsibilities in relation to IMI including IMI co-ordinators.

Article 6 obliges each Member State to appoint one national IMI co-ordinator which is effectively a body appointed by a Member State to perform support tasks necessary for the efficient functioning of IMI[4]. National co-ordinators have some duties which include the registering or validating of IMI co-ordinators and competent authorities, being the main point of contact for IMI actors (competent authorities, IMI co-ordinators and the Commission) and providing information on aspects of data protection. National co-ordinators also act as interlocutors of the Commission for issues relating to IMI, providing knowledge, training support and assistance to IMI actors[5].

Chapter II also deals with the roles of Competent Authorities, the role of the Commission, access rights of IMI actors and users, confidentiality, administrative co-operation procedures and external actors.

Article 7 requires competent authorities dealing with inquiries through IMI to provide adequate responses within the shortest possible period of time, ensures that competent authorities may use any information document, finding statement or certified true copy received electronically by means of IMI as evidence on the same basis as similar information obtained in its own country. This is an important provision ensuring that documents produced through the IMI system can only be challenged according to the rules of evidence applicable in a Member State and not simply on the basis that they are produced through IMI.

Article 10 requires each Member State to apply its rules of professional secrecy or other equivalent duties of confidentiality to its IMI actors and IMI users in accordance with national or union legislation. It is worth observing that professional secrecy in most codified or civil law systems is protected under criminal law, whereas the obligation of confidentiality in common law countries is normally reinforced by either professional disciplinary rules or contractual remedies.

Chapter III of the regulation deals with the processing of personal data and security. This was a significant issue for the Parliament and the Council in taking forward this regulation and is so in terms of the prospective regulation.

[1] Regulation EU No. 1024/2012 recital (1)

[2] Regulation EU No. 1024/2012 Chapter III – Processing of Personal Data and Security

[3] Regulation EU No. 1024/2012 art. 3.1

[4] In the UK the IMI Co-ordinator is based at the UK Department for Business, Innovation and Skills

[5] www.EC.Europe.EU/imi-net

Article 13 makes this clear by ensuring that IMI actors are limited to exchanging personal data only for the purposes of the union acts listed in the annex and setting limits on data submitted to IMI by data subjects.

Article 14 ensures that personal data processed in IMI is blocked as soon as it is no longer necessary for the purposes for which the data was collected. Article 15 allows the derogation from Article 14 to apply to the retention of personal data of IMI users for as long as those individuals are IMI users and allowing retention for a limited period of three years after the person ceases to be an IMI user.

Article 16 makes special provision for certain categories of data to be processed, particularly data under Article 8(1) of Directive 95/46/EC[1] and Article 10(1) of Regulation (EC No. 45/2001)[2].

Article 16(2) makes it clear that IMI can be used for the processing of data relating to offences, criminal convictions or security measures under Article 8(5) of Directive 95/46/EC and Article 10(5) of Regulation No.45/2001 and that this information can include aspects of disciplinary, administrative or criminal sanctions or other information necessary to establish the good repute of an individual or legal person where processing such data is provided for in a union act.

Article 17 requires the Commission to ensure that IMI complies with the rules on data security and that IMI actors should take all procedural and organisational measures necessary to ensure that the security of personal data processed by them in IMI.

Chapter IV deals with the rights of data subjects and supervision in four Articles 18, 19, 20 and 21 the regulation ensures that data subjects are informed about the processing of personal data and obliges the Commission to make publicly available information about IMI, the data protection aspects of exceptions and limitations and the types of administrative co-operation procedures when legislating affecting IMI to be made publicly available.

Chapter V provides for the geographic scope of IMI between member states (Article 22) and information exchanged with third countries. There are significant limitations on the use of IMI between actors within the EU and third country counterparts.

Chapter VI contains the final provisions in the Regulation dealing with committee procedure, monitoring and reporting costs and the repeal of decision 2008/49/EC which concerned the rudimentary establishment of the IMI on a very simple and limited basis.

It is fair to say that IMI is a functioning, secure, multi-lingual on-line tool which does facilitate the exchange of information between public administrations across the EEA that are involved in the practical implementation of EU law. From its early days as a tool it was designed to help the competent authorities in Member States meet legal obligations under the Services and the Recognition of Professional Qualifications Directives. The design of the system was flexible so adaptations could be made for future use in other policy areas.

Prospective regulation EC 2013/228 is exactly what was envisaged by way of expansion of IMI into new areas in a cost efficient, user friendly way. It is worth noting that using IMI under EC 2013/228 is an optional procedure and that authorities in a member state where there is doubt about the authority of a public document can approach the relevant issuing authority directly[3]. Statistics show that at the moment IMI is not used particularly extensively[4]. That, however, could change considerably if the proposed Regulation became law. It will depend on the trust which those receiving personal status documents (and their translations) are prepared to give and whether they need to exercise the IMI system to obtain confirmation of authenticity. Any expansion will need to be accompanied by adequate administrative and technical development in order to enable any new system to work.

[1] Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[2] Regulation (EC) No.45/2001 on the protection of individuals with regard to the processing of personal data by the Community Institution and bodies and the free movement of such data.

[3] COM(2013) 228 Article 7

[4] EU SIngle Market Information Sheet ec.europa.eu/internalmarket/imi-net/statistics/index_en.htm

IMI can provide "one to one" exchanges between competent authorities in Member States using predetermined questions, information or instructions and answers or rejections of these. IMI repositories which contain policy information are a centralised, secure means to share information. IMI can also give notifications where an authority can inform other authorities including the Commission of changes to national systems.

For the citizen, an important aspect is the IMI public interface which allows external bodies or individuals to manage their own accounts and review exchanges with Member State authorities.

2. TREATY AND LEGAL BASIS

When adopting the proposal for the Regulation[1] the European Commission applied Article 21(1) TFEU as the legal basis. In using this as a legal basis, the Commission recognised that "*administrative obstacles to the cross-border use and acceptance of public documents have a direct impact on the free movement of citizens*". Obviously a reduction in administrative obstacles should facilitate greater freedom of movement for citizens.

In addition to Article 21(1) and (2), the Commission combined the legal basis with Article 114 TFEU which provides with powers to adopt measures for the approximation if the provisions which have as their object the establishment and functioning of the internal market[2.] In its proposal, the Commission outlines that the administrative obstacles to the cross-border use and acceptance of public documents have a direct impact on the full enjoyment of the freedoms of the internal market for EU businesses.

2.1. The Commission Proposal and Policy Statement

In 2004, after the Tampere European Council and its Programme, the Commission underlined the importance of facilitating recognition of different types of documents as well as the mutual recognition of civil status.[3] Moreover, the Stockholm Programme[4], in 2009 highlighted the importance of making Union citizenship effective in order to put the citizens at the heart of EU policies in the area of justice. The Stockholm Programme's Action Plan[5] subsequently foresaw the adoption of a legislative proposal for disposing with the formalities for the legalisation of public documents between the Member States. At the same time, the European Parliament called for the introduction of a "simple and autonomous European system for [...] the abolition of requirements for legalisation of documents".

In its 2010 Citizenship Report, the European Commission confirmed its commitment to facilitate the free circulation of public documents within the EU with a Green Paper presented in December 2010 presenting its concrete vision to introduce "less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records"[6] The Green Paper outlined the issues by citizens, with a Eurobarometer survey reporting that three quarters of EU citizens (73%) considered that there was a need for measures to be taken to facilitate the movement of public documents between EU Member States. EU citizens

[1] COM(2013) 228 final Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012

[2] Article 114(1): [...]The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

[3] COM(2004) 401 final, Communication "Area of Freedom, Security and Justice: assessment of the Tampere programme and future orientations"

[4] The Stockholm Programme - An open and secure Europe serving and protecting citizens (2010/C 115/01), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XG0504(01)&from=EN

[5] COM(2010) 171 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 April 2010 – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0171:EN:NOT

[6] COM(201) 0747 final Green Paper "Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52010DC0747

are faced with bureaucracy and obstacles concerning the presentation and acceptance of their public documents when they move to another Member State.

In April 2013, the European Commission published its proposal for a Regulation on simplifying the acceptance of public documents. This proposed Regulation seeks to simplify administrative formalities and so facilitate and enhance the exercise by Union citizens' of the right to free movement within the EU and by businesses of the rights to freedom of establishment and to provide services within the Single Market whilst upholding the general public policy interest of ensuring the authenticity of public documents.

What does the proposal do?

The Commission's proposal aims to establish a set of horizontal rules exempting certain public documents from legalisation or a similar formality (i.e. Apostille). Its original scope (Article 1) covers public documents, issued by authorities of Member States, which have formal evidentiary value relating to birth, death, name, marriage, registered partnership, parenthood, adoption, residence, citizenship, nationality, real estate, legal status and representation of a company or other undertaking, intellectual property rights, and absence of a criminal record. Documents drawn up by private persons and documents issued by authorities of third states are excluded from its scope. The documents falling under the scope of the proposal are intended to be exempt from all forms of legalisation and similar formality (Article 4).

It also foresees the simplification of other formalities related to the acceptance of public documents in a cross-border situation. Such formalities mainly relate to certified copies and translations. Article 5(1) of the proposal provides that "authorities shall not require parallel presentation of the original of a public document and of its certified copy issued by the authorities of other Member States". Moreover, Article 6(1) provides that "authorities shall accept non-certified translations of public documents issued by the authorities of other Member States".

In order to provide a safeguard against fraudulent documents, the proposal, in Article 7, enables Member States to request information from the authorities of the Member State where the document was issued in cases where they have a reasonable doubt as to its authenticity. This request is to be made through IMI as provided in Article 8 of the proposal, or by contacting the Member State's central authority.

The original proposal also introduces, in Article 11, EU multilingual standard forms concerning birth, death, marriage, registered partnership and legal status and representation of a company or other undertaking. These forms shall be made available to citizens and companies by the Member State authorities as an alternative to equivalent public documents existing in that Member State.

The proposal does not address the issue of recognition of the effect of public documents between the Member States.

How does the proposed Regulation help the EU Citizen and European Business?

Citizens and businesses currently waste time and money to prove the authenticity of public documents issued in another Member State. This places a burden also on public administrations.

As outlined in the Commission's proposal, the adoption of the Regulation is designed to:-

- Reduce practical difficulties caused by the identified administrative formalities in particular cutting the related red tape, costs and delays;
- Reduce translation costs related to the free circulation of public documents within the EU;
- Simplify the fragmented legal framework regulating the circulation of public documents between the Member States;
- Ensure a more effective level of detection of fraud and forgery of public documents;
- Eliminate risks of discrimination among Union citizens and businesses.

If realised, the above results would be of great benefit to citizens exercising their free movement right. They would lower costs incurred by EU citizens and reduce administrative formalities which can act as obstacles to individuals and businesses moving from one Member State to another.

2.2. EU Developments with the negotiation of the current text

A number of developments have occurred in both the European Parliament and the Council.

European Parliament

Following the Commission's proposal, the European Parliament adopted a report[1] in February 2014, constituting the Parliament's position at first reading. In Amendment 11 of the report, the range of public documents falling under the scope of the proposal was significantly extended to include documents relating to immigration status, educational qualifications, tax and customs status, social security entitlements and entries in criminal records, amongst others.

With regard to the exemption from legalisation, Article 4 of the proposal provides that "public documents shall be exempted from all forms of legalisation and similar formality". The Parliament amended this text by providing that "Authorities shall accept public documents submitted to them which have been issued by authorities of another Member State or by Union authorities without legalisation or an Apostille".

Article 5(2) of the proposal provided that "*where the original of a public document issued by the authorities of one Member State is presented together with its copy, the authorities of the other Member States shall accept such copy without certification*". The European Parliament significantly modified this provision in its Amendment 17. "*If, in an individual case, an authority has reasonable doubts concerning the authenticity of an uncertified copy of a public document issued by the authorities of another Member State or by Union authorities, it may require the original or a certified copy of that document to be submitted, the choice being at the discretion of the person submitting it. If an uncertified copy of such a public document is submitted with a view to the entry of a legal fact or legal transaction in a public register, for the correctness of which public financial liability exists, the authority concerned may also require the original or a certified copy of that document to be submitted, the choice being at the discretion of the person submitting it, in cases where there is no reasonable doubt concerning the authenticity of the copy*".

With regard to certified translations, the Parliament also amended the Commission's text so Member States could only require such translations in exceptional cases due to the substantial costs incurred by citizens.

The Parliament also amended provisions relating to the certification of copies of public documents and the use of the multilingual standard forms. The Parliament proposed to add additional forms concerning name, descent, adoption, unmarried status, divorce, dissolution of a registered partnership, Union citizenship and nationality, absence of a criminal record, residence, educational certificates and disability.

Council of the European Union

The Commission's proposal has been examined extensively in the Council's Working Party on Civil Law since its publication in April 2013[70] The majority of Member State delegations have not been able to accept the wide scope of the proposal as presented by the Commission in its initial text, as well as that amended by the Parliament.

The Italian Presidency of the council suggested narrowing the scope of the proposed Regulation to civil status matters only. The Regulation would therefore only apply to public documents issued relating to (a) birth; (b) death; (c) name; (d) marriage; (di) registered partnership; (e) filiation; (f) adoption; (g) domicile and/or residence; (h) citizenship; (hi) nationality.

With regard to translation, the majority of Member State delegations have expressed a negative opinion on the principle that non-certified translations should be accepted in the context of this Regulation. The Italian

[1] Available at http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2014-0017&language=EN

Presidency suggested that a translation should not be required in cases where the public document is in the official language of the Member State. It would seem logical that certified translations of public documents made by a person qualified to do so under the law of a Member State should be accepted in all Member States. It is difficult to challenge such a reasonable proposition. Why should a document being presented in the French language in France require a French certified translator rather than a Belgian certified translator?

Concerning multilingual standard forms, the Italian Presidency suggested a possible solution where these forms could be used as a translation aid attached to the corresponding national public documents. The forms would simply have a harmonised common content. The Council is also discussing the relations with other instruments. Several Member State delegations wish to continue to manage other bilateral or multilateral Conventions. They also wish to clarify the relationship between the proposed Regulation and the 1961 Apostille Convention. This is extremely important – the law must be clear for Europe's citizens. Removing the need for apostilles will reduce some of the burden on citizens; however, if Member States refuse to accept documents with no apostille then this will reconstitute a barrier to free movement.

3. CONCLUSIONS: WHAT NEXT - DOCUMENTS WITHOUT BORDERS

Simplifying the acceptance of certain public documents in the EU and beyond could make a significant contribution to the completion of the internal market. Individuals could make good use of the proposal when moving across borders within the EU. Easily proving one's identity is a matter of fundamental right. Depending upon the prevailing administrative arrangements, establishing ones identity may be essential for a wide range of activities including the registration of births and deaths, contracting marriage, obtaining employment, housing, hospital care, qualifying for social benefits, entering educational institutions or requesting official documents and permits.

On the other hand, there are concerns about the potential cost and workload involved in dealing with an unpredictable number of requests from other Member States for the verification of doubtful documents.

There may be a benefit to citizens and businesses if registered company documents were included in the future.

With the vast number of public status documents potentially involved there would be advantages in having a limited programme to begin with and further expansion of the scope considered once the system has been established.

The proposal provides for a review every three years which includes whether the scope should be expanded. The take-up of the scheme and in particular how many verification enquiries might arise is very difficult to estimate. The UK issues over 400,000 apostilles per year but only about 25,000 fall under the scope of the proposal – other Member States may issue many more. The other issue is that relatively simple documents are easier to transmit across borders than complex documents with many variables.

The proposal for multilingual standard forms for birth, death and marriage, (including registered partnership) is to be welcomed. The purpose is to avoid citizens having to pay to have national forms translated for use in other Member States. There are no records of how many people currently get UK certificates translated for use in the EU. Originally it had been proposed that the multilingual standard forms would have the same formal evidentiary value as the Member State's national documents. However the guidelines reflect a recent suggestion to simply attach the translations to the original national documents rather than create translated standalone forms with their own evidentiary value. There is no need to create what would be an EU version of national civil status documents. It would also be easier to produce attached translation forms as security features wouldn't need to be as stringent.

One drawback of both the original and current multilingual forms/attachments is that they will have translated fields but with untranslated content transcribed from the original national document. The UK preference is for an easy version which would have the translated fields but no transcribed content – it wouldn't affect the end result and would be quicker and cheaper to produce (no staff time to fill in and check the entries, could be handed over the counter with minimal delay).

A clearer relationship is needed between the proposed regulation and the creation of the digital single market. President Juncker identified the creation of a digital single market as one of his ten priorities. He believes that there should be much better use of the 'great opportunities offered by digital technologies' which know no borders and intends to take ambitious legislative steps towards a connected digital single market. This means the breakdown of national silos and telecommunications regulation in copyright and data protection legislation and the simplification of consumer rules for online and digital purchases.

This vision for a digital single market also needs to focus on the acceptance of documents which the regulation proposes.

As noted, the majority of Member State delegations in the Council are not able to accept the wide scope of the proposal as presented by the Commission in its initial text. The Council's suggested narrowing of the scope of the proposal to civil status matters only will allow each of the areas covered by the proposal to be examined in greater detail at the technical level taking into account the national situation in each Member State. Providing Member States with the time to properly implement the regulation with reduced scope could be of benefit to the proper functioning of the instrument.

When considering the scope of the regulation, in conjunction with the definition of 'public document' it becomes clear that whilst this will fit well with the digital strategies of the United Kingdom and the Scottish Governments and also the nature of the European e-Justice Portal, these documents will be helpful to citizens but only of limited assistance to businesses[71].

For many businesses, who wish to comply with local immigration and employment law and some aspects of the enforcement of civil obligations, the scope of the documents covered may be rather too limited. Most businesses would have use for certificates concerning domicile and/or residence, citizenship and nationality and birth, some other certificates currently in scope might be of limited usefulness in building the single market.

The proposed provisions of the Regulation could contribute to the completion of the single market by further removing obstacles faced by individuals and businesses when moving and trading across Member State borders. However, it must be emphasised that a number of other factors need to be considered before the single market can be completed.

For example, as outlined in the Commission's Report on Competition in Professional Services in 2004, there is a need for proper competition in the provision of professional services across Europe. While many of the reforms required under that communication have been implemented in many Member States, some have not. In order to guarantee the removal of undue or disproportionate restrictions on competition for businesses and practitioners, such as the liberal professions, the European Parliament may wish to consider revisiting the work undertaken to date by the Commission to ascertain whether there are still undue or disproportionate restrictions in competition for professions in the EU.

Biography

Michael Paul Clancy graduated from the University of Glasgow in 1979 taking an LL.B degree and in 1985 taking an LL.M degree. In 1987 he graduated LL.B (Hons) from the University of London. He is a solicitor and Notary Public. After qualification as a solicitor in private practice he had attained a partnership with the Glasgow firm of Franchi Wright & Co. He resigned this partnership in 1988 to become a Deputy Secretary of the Law Society of Scotland. Since 1996 he has been a Director of the Society with responsibility for Law Reform and Parliamentary issues. He has published widely on a range of legal topics. Mr. Clancy was awarded an O.B.E. in the Queen's Jubilee Birthday Honours List in June 2002.

Session I - Less paper work for mobile citizens

Towards European Model Contracts for Succession and Family Law?

Christiane Wendehorst

Families in the EU with a transnational element are still facing a range of problems, such as unexpected legal effects of moving to another jurisdiction, forum shopping, a patchwork of applicable laws, and excessive uncertainty for particular family constellations. It is therefore suggested that European model dispositions concerning (i) choice of court, (ii) choice of applicable law, and (iii) submission to family mediation are introduced, which citizens must be made aware of whenever a marriage or registered partnership is concluded, a cross-border change of residence is registered, and in similar situations.

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LIST OF ABBREVIATIONS

BGB	Bürgerliches Gesetzbuch (Germany)
BGH	Bundesgerichtshof (Germany)
cf.	compare
CJEU	Court of Justice of the European Union
ECHR	European Court of Human Rights
e.g.	for example
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch (Germany)
EheG	Ehegesetz (Austria)
EPG	Eingetragene Partnerschaft-Gesetz (Austria)
et seq.	and the following one(s)
EU	European Union
i.e.	that is, in other words
IPRG	Gesetz über das Internationale Privatrecht (Austria)
LPartG	Gesetz über die eingetragene Lebenspartnerschaft (Germany)
n.	note, footnote
No	Number
OJ	Official Journal of the European Union
p.	page
PACS	Pacte civil de solidarité (France)
Sec.	Section
v.	versus

EXECUTIVE SUMMARY

Recent EU legislation in family and succession law has achieved far-reaching unification of the rules concerning applicable law, jurisdiction, recognition and enforcement as well as free movement of documents. The benefits for European families include enhanced certainty and predictability, more party autonomy and better access to justice. However a number of problems remain yet to be solved in order to remove obstacles for families with a cross-border dimension.

Problems encountered by families with a transnational element

As habitual residence has become the dominant connecting factor in EU conflict rules a change of habitual residence often results in a change of the applicable law. Even an existing family relationship may have completely different legal effects upon moving into another jurisdiction. This may lead to unexpected effects and to hardship, in particular for the weaker party in a relationship.

Another problem faced by transnational families is that, in particular in the context of a divorce or separation, the existing EU conflict rules encourage forum shopping and a 'rush to court'. Also, there may be a patchwork of two or three applicable laws even in standard cases, which drastically reduces certainty and predictability of the law and leads to unnecessary costs.

The situation for same-sex marriages and for registered partnerships, and even more so for *de facto* cohabiting couples, is disastrous in terms of certainty and predictability of results in a cross-border setting. In particular as concerns *de facto* cohabitation this may create severe hardship, and usually so for the weaker party.

Suggested solutions

In most cases, unexpected effects of a change of habitual residence could have been avoided if the parties had, in due time, made a choice concerning jurisdiction and applicable law under the existing EU instruments. Equally, the problem of forum shopping and of a patchwork of applicable laws could largely be solved by way of early choice of court and of law. However, couples are usually not aware of these options, or do not dare raise the issue in a relationship, or are not sure it could be done at affordable costs.

It is therefore suggested that European model dispositions concerning (i) choice of court, (ii) choice of applicable law, and (iii) submission to family mediation are introduced, which citizens must be made aware of and get access to whenever a marriage or registered partnership is concluded, a cross-border change of residence is registered, and in similar situations. They should be accompanied by simple standard information sheets. In particular in divorce and separation cases, the model dispositions could help reduce complexity by offering to the parties a limited set of recommended 'one-stop shop packages'. They could be introduced as a flanking measure to the recast of the Brussels IIa Regulation and/or the enactment of the Regulations on property regimes.

The problem of uncertainty for same-sex spouses, registered partners and *de facto* cohabiting couples can only be solved by the European legislator, as choice of court and/or law agreements between the parties would, under the current legal situation, not necessarily be enforceable. A comprehensive codification of EU conflict rules, at least for family matters ('EU conflict code in family law'), would clearly be the favourable solution. If this turns out not to be realistic for political reasons, a set of EU model marriage, partnership and cohabitation contracts, to be introduced as a Regulation and derogating existing EU and national rules where necessary, could be an alternative.

1. CROSS-BORDER FAMILY RELATIONS IN THE EU[1]

KEY FINDINGS

- An increasing number of families within the EU have a transnational element in the sense that family members do not share a common nationality and country of habitual residence or that one or several family members live outside the country of their (original) nationality and/or the country of their original habitual residence.
- Smooth legal management of cross-border family relationships is an essential factor for European citizens to make effective use of their freedoms under the Treaties and for the functioning of the internal market.
- Among the legitimate expectations European citizens have concerning any European conflict of laws framework in the field of family and succession law are legal certainty and predictability, flexibility through party autonomy, best interests of children and protection of vulnerable parties, access to justice at affordable costs and discouragement of forum shopping or a rush to court.

1.1. Significance of smooth legal management of cross-border family relationships

The mobility of Union citizens is a practical reality, evidenced by the fact that some 12 million of them study, work or live in another Member State of which they are not nationals.[2] Making Union citizenship effective through a well-functioning European judicial area and promotion of citizens' rights implies, among others, the elimination of disproportionate barriers hampering the full enjoyment of the right to freedom of movement. Fostering mobility of citizens and businesses across borders in the EU is also one of the preconditions of further growth of the internal market.

Conflict of laws in the areas of family and succession law plays a key role for the smooth legal management of cross-border relations. However, despite the introduction of a significant number of EU legal instruments for transnational family relations, there remains much to be improved. For example, an existing legal relationship may have completely different legal effects upon moving into another jurisdiction: rights may be lost and obligations may be created. There may be uncertainty as to where to bring a claim to court, what is the law governing the claim, and how the claim relates to other claims governed by different laws. Such difficulties are accompanied by considerable financial consequences. It has been estimated that the financial costs created by various problems associated with the property relations of transnational couples amount to 1.1 billion euro per annum;[3] together with the financial costs emanating from issues such as divorce and separation, maintenance, pension schemes, parental responsibility and successions, this means an enormous factor for European economy as a whole.

Statistical data for the year 2007 indicate that in EU27 there were 2,430,730 new marriages in total, of which 2,123,414 (87%) were national and 307,158 were international (13%).[4] Despite an overall decline in the number

[1] I am indebted to Katharina Boele-Woelki, President of the European Commission on Family Law (CEFL), and to the Austrian Chamber of Notaries and members of CNUE and the ENN network, for commenting on earlier versions of this outline. All errors are mine. The ideas presented in this study are part of a joint project titled 'Empowering European Families', which starts in early 2015 and could possibly be conducted under the auspices of the European Law Institute (ELI).

[2] COM(2013) 228 final, p. 4.

[3] EPEC, Impact Assessment Study on Community Instruments concerning matrimonial property regimes and property of unmarried couples with transnational elements, Final Report to the European Commission, 2010, p. 10 (http://ec.europa.eu/justice/civil/files/ia_on_mpr_main_report_en.pdf).

[4] EPEC (n. 3) p. 69.

of marriages celebrated in the Union, the numbers of new international marriages rose from 216,995 in 2000 to 241,224 in 2007.[1]

1.2. The current state of EU legislation in the field ignificance of smooth legal management of cross-border family relationships

Recent EU legislation has achieved far-reaching unification of the rules concerning applicable law, jurisdiction, recognition and enforcement as well as certificates in the areas of family and succession law. The following overview will focus on issues potentially relevant for the introduction of European model dispositons in family and succession law.

Regulation (EU) No 2201/2003 ('Brussels IIa Regulation')

Regulation (EU) No 2201/2003 (commonly referred to as 'Brussels IIa Regulation')[2] provides for uniform rules of jurisdiction and of the recognition and enforcement of judgments as well as enforceable authentic instruments and agreements in matters of divorce, legal separation or marriage annulment and in matters of the attribution, exercise, delegation, restriction or termination of parental responsibility. As to the latter, the Regulation complements, and partly modifies, the provisions of the Hague Convention of 25 October 1980 on the civil aspects of international child abduction ('the 1980 Hague Convention').[3] Among the matters excluded from the scope of the Regulation are maintenance obligations and property consequences[4] in the context of the dissolution of a marriage, the establishment or contesting of a parent-child relationship, trusts and succession.

When it comes to proceedings for the dissolution of a marriage, Article 3 lists seven alternative grounds of jurisdiction among which the applicant may choose at his or her discretion, with Article 19 establishing priority of the court first seised (*lis pendens* rule). There is currently no possibility for the parties to designate in advance the Member State whose courts shall have jurisdiction to hear the case.

As to the effects a divorce etc. has on parental responsibility Article 12 provides for prorogation of jurisdiction in favour of the Member State whose court is exercising jurisdiction with respect to the dissolution of the marriage where certain conditions are met, in particular where the spouses have 'accepted in an unequivocal manner' the jurisdiction of the courts of that Member State at the time the court is seised, and it is in the superior interests of the child. Where these conditions are not met jurisdiction normally lies with the courts of the Member State where the child is habitually resident unless the court seised finds that the courts of another Member State would be better placed to hear the case.

Regulation (EU) No 1259/2010 ('Rome III Regulation')

Regulation (EU) No 1259/2010 (commonly referred to as 'Rome III Regulation')[5] provides for uniform rules as to the law applicable to divorce and legal separation. Excluded from the scope of the instrument are, inter alia, property consequences, maintenance, trusts and succession. The Rome III Regulation implements enhanced cooperation between originally 14 Member States. Today, it already applies in 15 and will soon apply in 16 out of 28 Member States.[6]

The law applicable to divorce and legal separation is primarily the law designated by the parties, who may choose among: the law of the State where the spouses are habitually resident at the time the agreement is concluded; the law of the State where the spouses were last habitually resident, in so far as one of them still resides

[1] EPEC (n. 3) p. 72.

[2] Council Regulation (EU) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p.1. The Regulation applies in all Member States except Denmark.

[3] As to the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Hague Convention') see Article 61.

[4] Recital 8.

[5] Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ L 343, 29.12.2010, p. 10.

[6] The Regulation already applies in Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Lithuania (since 22.5.2014), Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia. Greece will join as from 29 July 2015 (OJ L 23, 28.1.2014, p. 41).

there at the time the agreement is concluded; the law of the State of nationality of either spouse at the time the agreement is concluded; or the law of the *forum*.

In the absence of a choice by the parties divorce and legal separation are governed by the law of the State: (a) where the spouses are habitually resident at the time the court is seized; or, failing that (b) where the spouses were last habitually resident, provided that the period of residence did not end more than 1 year before the court was seized, in so far as one of the spouses still resides in that State at the time the court is seized; or, failing that (c) of which both spouses are nationals at the time the court is seized; or, failing that (d) where the court is seized.

The 1996 Hague Convention

Like the Rome III Regulation supplements the Brussels IIa regime concerning the law applicable to divorce and legal separation, it is the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[1] that supplements the Brussels IIa regime concerning the law applicable to matters relating to parental responsibility.

As a general rule, courts and authorities that have jurisdiction will apply their own law (Article 15). The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child. The same holds true for the attribution or extinction of parental responsibility by an agreement or a unilateral act, and the exercise of parental responsibility (Articles 16 and 17).

Regulation (EU) No 4/2009 ('Maintenance Regulation')

Regulation (EC) No 4/2009[2] (commonly referred to as 'Maintenance Regulation') provides uniform rules of jurisdiction and a range of further measures aimed at facilitating the payment of maintenance claims in cross-border situations. Maintenance obligations covered by the Regulation may arise from a family relationship, parentage, marriage or affinity. According to Article 3, jurisdiction shall, alternatively, lie with the court of the place where the defendant or the creditor is habitually resident or the court which has jurisdiction to entertain proceedings regarding the status of a person (e.g. a divorce) or parental responsibility if the matter relating to maintenance is ancillary to those proceedings. Article 15, refers to the uniform rules concerning the applicable law contained in the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations ('the 2007 Hague Protocol').[3]

Except for disputes relating to a maintenance obligation towards a child under the age of 18, the parties may, under the conditions spelt out in Article 4, agree on the Member State whose courts shall have exclusive (or, in fact, non-exclusive) jurisdiction to hear the matter, or on a particular court in that Member State. Any such choice of court agreement must be in writing, including by durably recorded electronic communication.

Under Article 3 of the 2007 Hague Protocol, maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor. However, in the case of a maintenance obligation between spouses, ex-spouses or parties to a marriage which has been annulled, if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage, the law of that other State shall apply (Article 5).

Except as concerns maintenance obligations towards children under the age of 18 or other vulnerable persons, the parties may agree on the applicable law, provided this is the law of a State of which either party is a national or in which either party has their habitual residence at the time of the designation, or the law designated as applicable or in fact applied to the parties' property regime or divorce or legal separation. However, the question of whether the creditor can renounce his or her right to maintenance is determined by the law of the State of the habitual residence of the creditor at the time the agreement is made. There is also the possibility for the court to set aside a choice of the applicable law where that law would lead to manifestly unfair or

[1] Applies meanwhile in all Member States.

[2] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations: OJ L 7, 10.1.2009, p. 1. The Regulation is applicable in all Member States except Denmark, which has, however, confirmed its intention to implement the content.

[3] The 2007 Hague Protocol is, since 1 August 2013, applicable in all Member States except Denmark and the United Kingdom.

unreasonable consequences for any of the parties and the parties were not fully informed and aware of the consequences.

Regulation (EU) No 650/2012 ('Succession Regulation')

Regulation (EU) No 650/2012[1] (commonly referred to as 'Succession Regulation') contains uniform rules about jurisdiction, applicable law, recognition and enforcement in matters of succession and introduces a European Certificate of Succession.

According to Article 21, the law applicable to the succession as a whole is normally the law of the State in which the deceased had his habitual residence at the time of death unless, by way of exception, it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with another State, in which case that other law applies. A person may choose as the law to govern his succession the law of any State whose nationality he possesses at the time of making the choice or at the time of death.

Jurisdiction is normally with the courts of the Member State in which the deceased had his habitual residence at the time of death (Article 4). The deceased himself cannot directly make a choice concerning jurisdiction, but where he has chosen the applicable law the surviving parties concerned may agree that the courts of the State whose law is applicable shall hear the case, or the court first seised may, upon the request of one of the parties, decline jurisdiction in favour of the courts of that State. Under certain circumstances, the courts may have subsidiary jurisdiction where the habitual residence of the deceased at the time of death is not located in a Member State, the courts of a Member State in which assets of the estate are located shall nevertheless have jurisdiction to rule on the succession as a whole in so far as: There are also rules on *forum necessitatis*.

1.3 Pending Proposals

Two very important proposals from 2011 for new legislation in the area are still being discussed in Council. Meanwhile, there are compromise texts dating from November 2014.[2]

Matrimonial property regimes

The first is a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.[3] It also includes a rule on the formal validity of matrimonial property agreements.

Spouses or future spouses may agree to designate the law applicable to their matrimonial property regime, provided that it is the law of the State where at least one of the spouses is habitually resident or the law of a State of nationality of either spouse at the time the agreement is concluded. Unless the spouses agree otherwise, a change of the law applicable to the matrimonial property regime made during the marriage shall have prospective effect only. In the absence of a choice the law applicable to the matrimonial property regime, there is a cascade of connecting factors, starting with the spouses' first common habitual residence after the celebration of the marriage. However, there is also an escape clause, i.e. the law of the State of the last common habitual residence prevails where the spouses had lived in that other State for a significantly longer period and both spouses had relied on the law of that other State in arranging or planning their property relations

Jurisdiction lies with the courts that have jurisdiction concerning divorce or legal separation, or succession, according to the Brussels IIa or Succession Regulation. Under certain circumstances, the parties may, after a court has been seised, agree on different courts. Where there is no divorce or legal separation, and none of the spouses has died, there is a cascade of grounds of jurisdiction, starting with courts of the Member State in whose territory the spouses are habitually resident at the time the court is seised, or failing that, in whose territory the spouses were last habitually resident, insofar as one of them still resides there at the time the court

[1] Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 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, OJ L 201, 27.7.2012, p. 107.

[2] http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2016171%202014%20INIT.

[3] COM(2011) 126 final of 16 March 2011 and Compromise text 15275/14 JUSTCIV 281 of 10 November 2014.

is seised. The parties may instead agree that the courts of the Member State whose law is applicable have exclusive jurisdiction to rule on matters of their matrimonial property regime.

Property consequences of registered partnerships

The other pending piece of legislation is a proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.[1] It is very similar to the proposed Regulation on matrimonial property, but the law of the State under whose law the registered partnership was created plays a special role, e.g. as a law which the partners may designate to govern their property relations and which is the only law, besides the law applicable by virtue of the escape clause, that governs the property relations in the absence of a valid choice by the partners.

2. SELECTED PROBLEMS ENCOUNTERED BY FAMILIES WITH A TRANSNATIONAL ELEMENT

KEY FINDINGS

- EU conflict rules usually rely on habitual residence as the primary connecting factor rather than on nationality. While there are good reasons for favouring the principle of habitual residence in an ever converging area of freedom, security and justice it usually means a change of the applicable law whenever parties make use of their freedoms under the Treaty and change their habitual residence within the EU. As parties are usually not aware of this fact this may lead to unexpected and unwanted results and cause hardship, in particular for the weaker party in a relationship.
- The Brussels IIa Regulation as it currently stands, in conjunction with the absence of unified conflict of law rules in the entire EU, creates incentives for forum shopping and for a spouse to 'rush to court' and start proceedings before the other spouse does. This may lead to unfair results and diminishes chances of reconciliation between the spouses. Similar problems of forum shopping may occur in other areas.
- The average cross-border case in the EU still involves the application of two or three different national laws that often lead to results not readily reconcilable with each other. This creates unnecessary burden and costs, undermines certainty and predictability of the law, and may lead to unsatisfactory results. Conflict lawyers have, over the centuries, developed techniques how to deal with such intricacies in individual cases, but free movement of European citizens within the Union territory requires smoother and more predictable solutions.
- As long as there is no comprehensive codification of EU conflict law in the area of family law there will always be significant gaps and a considerable degree of incoherence, due to the fact that the existing instruments were drafted at different points in time and under differing political constraints. Among those gaps and/or uncertainties are, for instance, the status of same-sex marriages and the dissolution of registered partnerships.
- A growing number of couples within the EU is neither married nor registered as a partnership. Already in a purely domestic setting, this may lead to very complex legal solutions where the couple breaks and there is a need for reallocation of property or compensation for losses suffered. In a cross-border setting, it is not even clear which are the applicable conflict rules both concerning conflicts of jurisdiction and conflicts of law. This seems to be an unacceptable situation, which again is usually to the disadvantage of the weaker party in a relationship.

While much has been achieved in facilitating life for European transnational families there are still many hurdles to overcome. Most problems encountered by families with a cross-border element have their origin in areas other than conflict of laws, such as recognition of school and occupational qualifications and effective access to the job market. However, some problems are also connected with conflicts of jurisdiction and applicable law in

[1] COM(2011) 127 final of 16 March 2011 and Compromise text 15275/14 JUSTCIV 282 of 10 November 2014.

the areas of family and succession law and, more generally, with the differences between the various national legal systems.

For practical reasons this study will focus on some selected problems in the area of conflict of jurisdiction and applicable law, which have a sufficient potential of being addressed by way of standardised advance party agreement or unilateral disposition. This means, for instance, that while much of the current debate about families in Europe concentrates on issues of cross-border child abduction, and while issues of parentage become ever more important in times of thriving 'reproductive tourism', these aspects will be left out for the very simple reason that they arguably cannot be solved, at least not primarily, by party agreement and in particular not by standard agreements made long before any conflict has arisen.

2.1 Parties taken by surprise after moving to another jurisdiction

A change of habitual residence within the EU has become a rather common phenomenon, for individuals as well as for whole families. Unification of conflict-of-law rules has brought about a shift from the nationality principle, which had been the overarching paradigm in many Member States, to the principle of habitual residence as the primary connecting factor. In the absence of a valid choice of the applicable law by the parties, the habitual residence at the time of, for instance, the conclusion of a marriage, divorce or death, will normally decide about the applicable law. A change of habitual residence may therefore lead to consequences the parties, or one of the parties, had never anticipated as they were unaware of the fact that moving cross-border changes their private relationships

Changing one's habitual residence

There is no uniform definition as to what constitutes habitual residence of a natural person acting outside his or her business activities, but it is rather left to the courts to carve out the details in the light of the longstanding tradition this connecting factor has had, not least, in numerous international conventions.

The most elaborate explanation in EU law is to be found in Recitals (23) and (24) of the Successions Regulation: "(23) …In order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of this Regulation. (24) In certain cases, determining the deceased's habitual residence may prove complex. Such a case may arise, in particular, where the deceased for professional or economic reasons had gone to live abroad to work there, sometimes for a long time, but had maintained a close and stable connection with his State of origin. In such a case, the deceased could, depending on the circumstances of the case, be considered still to have his habitual residence in his State of origin in which the centre of interests of his family and his social life was located. Other complex cases may arise where the deceased lived in several States alternately or travelled from one State to another without settling permanently in any of them. If the deceased was a national of one of those States or had all his main assets in one of those States, his nationality or the location of those assets could be a special factor in the overall assessment of all the factual circumstances."

It is to be noted that these explanations refer exclusively to the notion of 'habitual residence' in the Succession Regulation and may not simply be used for the construction of the concept of habitual residence in other EU instruments. In any case, they give us an idea of what the concept is about and illustrate that it is rather common for individuals or for whole families to change their habitual residence. For example, this is normally the case where the family home is transferred from one Member State to the other for an indefinite period, or where an individual leaves his or her family with an intention to break off relations and the new centre of gravity of that individual's private life is in another State.

Examples of unexpected effects

In a first group of cases, unexpected effects are the result of habitual residence as a connecting factor as such, in conjunction with a lack of awareness on the part of the individuals involved: They have no clear idea about law,

even less about conflict of laws, which is why they do not expect that moving to another country may change their personal relationships.

Example No 1:

Franz, an Austrian national living in Austria with his Austrian wife Theresia and their two children, takes on a new position in Hamburg and instigates his family to follow him and permanently settle in Germany. There he falls in love with another woman, Barbara, and files an action for divorce under German law after one year of factual separation.[1] German law has, under the Rome III Regulation, become the law applicable to divorce.[2] Theresia, who would like to see the family stay together, is taken by surprise as she is familiar only with the Austrian fault principle under which she would have been entitled to object to the divorce for up to six years of separation.[3]

In Example No 1, the concept of marriage seems to be roughly the same in Austria and in Germany, and yet the rules on divorce are very different, which changes the extent to which Theresia can rely on the durability of the relationship.

Example No 2:

Lionel and Sue live in the UK as a cohabiting couple. Sue, who stays at home as a housewife and supports Lionel in pursuing his career, would like to marry Lionel, but Lionel is hesitant, in particular as he is anxious about a considerable estate he expects to inherit from his father. The couple later gives up their domicile in the UK and takes up a habitual residence in Brussels. None of the two reflects properly on the effects of that move, and certainly not about consequences in the event of death, but both rely on some basic legal knowledge they have about family provisions.[4] When Lionel is killed in a traffic accident and dies intestate, it turns out that his parents are the sole heirs and Sue comes away empty-handed under Belgian law.[5]

Needless to say, surprising effects may be produced also where there is a total gap in EU conflict rules, i.e. no uniform EU conflict rules exist at all, like for the dissolution of registered partnerships. Many Member States have conflict rules referring to the law of the State where the partnership was registered, but other Member States have a cascade of connecting factors akin to that of the Rome III Regulation.

Example No 3:

François and Amélie are French citizens who have entered, in France, into a PACS. They both move to Austria on a permanent basis, where Amélie falls in love with Ferdinand. Amélie and Ferdinand intend to marry, and a marriage would automatically dissolve the PACS with François under French law.[6] According to Austrian conflict of laws, however, the dissolution of the relationship with François would arguably be governed by Austrian law,[7] which requires a ground for divorce and formal

[1] BGB Sec. 1565. It is to be noted, though, that there is an *irrebuttable presumption* for the breakdown of the marriage only after three years of separation, or if the other spouse agrees, cf. Sec. 1566, and that Sec. 1568 provides for an escape clause in cases of unusual hardship.
[2] Rome III Article 8(a).
[3] EheG Sec. 55(2) and (3).
[4] Sec. 1(1)(e) Inheritance (Provision for Family and Dependants) Act 1975 (England and Wales).
[5] http://www.successions-europe.eu/en/belgium/topics/in-the-absence-of-a-will_who-inherits-and-how-much.
[6] http://vosdroits.service-public.fr/particuliers/F1620.xhtml#N100BE.
[7] IPRG Sec. 27d(1).

divorce proceedings also for registered partnerships.[1] So, François could possibly stop Amélie from marrying Ferdinand for a considerable period of time.

There is another group of cases where there is primarily an issue of recognition or non-recognition of a family relationship as such.

Example No 4:

Anna and Barbara, who have entered into a registered partnership under Austrian law,[2] move to Poland. Years later, Anna dies intestate, without having made a choice concerning the law applicable to succession. Barbara is denied any share in the estate by the Polish courts, which have jurisdiction under the Succession Regulation,[3] because Polish law has become applicable[4] and fails to recognise inheritance rights of registered same-sex partners.[5]

Theoretically, Polish courts could, when applying Polish succession law, recognise the Austrian registered partnership as equivalent to marriage for the purpose of intestate succession, but they will most probably not do so, not least due to considerations of public policy. It is not clear to what extent they could be required by the freedoms under the Treaties or by fundamental rights to recognise the partnership (see ECHR *Kozak v. Poland* for succession to a tenancy contract). For many years, the CJEU seemed to be rather strict about conflict rules which were found not to be in conformity with freedom of movement and other rights under primary EU law.[6] Recently however, there are indications that European secondary law takes a more lenient approach, in particularly allowing the courts of a Member State to decline jurisdiction in case a marriage or registered partnership concluded in another Member State would, from the point of view of that Member State, not be considered as valid.[7] There is, however, no such rule in the Succession Regulation unless in the case of a choice of the applicable law, which is why Polish courts would probably simply ignore the same-sex partnership and identify Anna's relatives as heirs.

While the situation in the EU for registered partners and same-sex couples is difficult, it is even more difficult for cohabiting couples (see in more detail *infra* p. 90 et seq.), as is illustrated by Example No 5.

Example No 5:

Nik and Lara, two Slovenian citzens, have been cohabiting without being formally married in Ljubljana for more than three years. When Lara is offered a very good job in Vienna the couple moves to Austria. Two years later, Lara is killed in a car accident and dies intestate. Under Slovenian law, Nik as Lara's partner in a long-term relationship would have enjoyed the same inheritance rights as a spouse.[8] However, according to the Successions Regulation, Austrian law has become the law

[1] EPG Sec. 15 to 18.
[2] '*Eingetragene Partnerschaft*' under the EPG.
[3] Successions Regulation Article 4.
[4] Successions Regulation Article 21(1). There are no sufficient indications that Anna was, at the time of death, manifestly more closely connected with Austria within the meaning of the escape clause in Article 21(2).
[5] http://www.successions-europe.eu/en/poland/topics/in-the-absence-of-a-will_who-inherits-and-how-much.
[6] See, e.g., in the field of name law CJEU, Judgment of the Court of 2 October 2003, Case C-148/02 (*Carlos Garcia Avello v Belgian State*), Reports 2003 I-11613 CJEU, Judgment of the Court (Grand Chamber) of 14 October 2008, Case C-353/06 (*Stefan Grunkin and Dorothee Regina Paul*), Reports 2008 I-07639.
[7] Rome III Regulation Article 13; Article 5b1 of document 15275/14 JUSTCIV 281 and Article 5b of document 15275/14 JUSTCIV 282, both of 10 November 2014.
[8] http://www.successions-europe.eu/en/slovenia/topics/in-the-absence-of-a-will_who-inherits-and-how-much.

applicable to succession.[1] According to Austrian law Nik has no rights whatsoever[2] and the whole estate passes to Lara's relatives.

Example No 5 is, in a way, similar to Example No 1 as the problem results from differences in the domestic laws involved. However, it also includes an issue of recognition or non-recognition as Slovenian law affords to Nik a special status which he is denied under Austrian law. There is a chance that Austrian courts will somehow find a solution in the light of fundamental rights and freedoms concerned, but this is by no means clear, and Lara's relatives have much better chances to win their case.

Solutions to the problem

In Examples No 1 the parties would normally have been prepared, at the point in time the marriage was concluded, to agree on the applicable law if they had been sufficiently aware of that option; so they would either have opted for Austrian law, which would have avoided the problem, or they would have opted for German law, which, assuming that the choice was made on the basis of sufficient and reliable information, would at least have meant that Theresia knows about the risks. When the matter comes to court, however, Franz benefits from the surprising result and will no longer agree to anything different.

In Example No 2, Lionel would probably have been prepared to choose English law, or in fact to draw up a will, if he had been made aware of the problem upon his moving to Brussels. However, once he has died it is too late for a choice of law or a will, and his parents may not be readily prepared to share the estate with Sue.

In both Examples No 4 and No 5, choosing the law applicable to Succession under the Successions Regulation would have avoided the problematic situation: If Anna had chosen Austrian law the Polish court and authorities would have had to apply Austrian inheritance law according to which a registered partner has inheritance rights. If Polish courts are not prepared to decide according to Austrian law for reasons of public policy, they should decline jurisdiction under Article 6(a) of the Succession Regulation and make way for proceedings in Austria. More or less the same holds true if Lara had chosen Slovenian law, i.e. Austrian courts would have to apply Slovenian law and recognise Nik's inheritance rights or, if they are not prepared to do so, decline jurisdiction.

It is only Example No 3 that could not have been solved by way of choice of court and/or law, at least not as the law currently stands: There are no uniform EU conflict rules concerning the dissolution of a registered partnership, and the relevant Austrian conflict rules do not allow for a choice of the applicable law. There will probably be some pragmatic solution, such as Amélie notifying the French court, or notary, that has registered the PACS in the first place[3] and Austrian authorities accepting the dissolution of the PACS by the French court or notary, but it is not a clear cut case and there may be difficulties in practice.

2.2 Forum shopping and patchwork of applicable laws

Another problem encountered by families with a transnational element is that of forum shopping, i.e. of parties starting proceedings in a particular Member State for purely strategic reasons. Also, it is the sheer complexity of the law and the resulting patchwork of different forums and applicable laws which poses serious problems for transnational families and creates unnecessary costs.

Forum shopping and 'rush to court'

As has been explained supra at 0, Article 3 of the Brussels IIa regulation lists no less than seven alternative grounds of jurisdiction for the dissolution of a marriage by divorce, legal separation or annulment. The grounds are not arranged in a hierarchical manner; rather, the applicant may choose at his or her discretion where to start proceedings. Once one of the spouses has started proceedings in one Member State, any court second seised in another Member State shall of its own motion stay its proceedings until such time as the jurisdiction of

[1] Successions Regulation Article 21(1).
[2] http://www.successions-europe.eu/en/austria/topics/in-the-absence-of-a-will_who-inherits-and-how-much.
[3] http://vosdroits.service-public.fr/particuliers/F1620.xhtml#N100D2.

the court first seised is established, and when it is established, the court second seised shall decline jurisdiction in favour of the other court (Article 19). It is therefore decisive who of the spouses is first to start proceedings, because this spouse *de facto* decides where the case will eventually be decided.

While providing for maximum flexibility as well as preventing parallel proceedings in different Member States, this may, in conjunction with the absence of harmonised conflict-of-law rules in the entire Union (*supra* 0, p. 79), induce a spouse to 'rush to court' and apply for divorce before the other spouse does to ensure that the court seised and the law applied will safeguard his or her own interests.[1] This may not only result in an unfair advantage for the spouse who can afford better legal advice, but also diminishes chances of reconciliation between the spouses.

Example No 6:

Herbert, a German widower, and Mary, who was born in London but has been living in Germany for a long time, enter into a marriage in Germany. As both Herbert and Mary own a considerable estate, and as Herbert would like to pass this estate on to the four children from his previous marriage, Herbert and Mary conclude a pre-nuptial agreement according to which there shall be no mutual obligations whatsoever in the case of a divorce. When the couple breaks up, Mary quickly re-establishes her UK domicile by moving to London and starts proceedings for divorce before a London court.[2] The court in London will not consider the pre-nuptial agreement as strictly binding,[3] and may even disregard it, whereas it would have been fully upheld by a German court.[4]

Forum shopping is a phenomenon which is not restricted to the Brussels IIa regime. Rather it is encouraged in many contexts, e.g. when it comes to the dissolution of a registered partnership, for which no uniform EU conflict rules exist at all. Two different models seem to dominate: Some Member States always apply the law of the State where the partnership has been registered, while others apply a set of connecting factors similar to those applicable to a marriage, be it a modified Rome III scheme or be it a scheme still based on nationality:

Example No 7:

Two male German nationals, Detlef and Dirk, who have entered into a German '*eingetragene Lebenspartnerschaft*' move to Austria in order to live there on a permanent basis. When Detlef falls in love with another man, he would like to dissolve the relationship with Dirk. According to Austrian conflict rules, Austrian law would apply to the dissolution[5] (largely relying on the fault principle[6]), whereas German conflict rules would refer to German law[7] (no fault principle[1]). Therefore, Detlef has strong incentives to rush to a German court, whereas Dirk possibly tries to rush to an Austrian court.

[1] Report of 15 April 2014 from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, COM(2014) 225 final, p. 5.

[2] This is possible after six months, cf. Brussels IIa Article 3(1)(a), sixth indent.

[3] For the principle of sharing see, e.g. *White v. White* [2000] UKHL 54, [2001] 1 AC 596. In the landmark decision of *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534 at [75] the Supreme Court held: "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement". However, even after *Radmacher v Granatino* it remains impossible for a marital property agreement to oust the court's jurisdiction to make financial orders. For details and recommendations for a change of the law and the future recognition of 'qualifying nuptial agreements' see the Law Commission Report: Matrimonial Property, Needs and Agreements (LAW COM No 343), http://lawcommission.justice.gov.uk/docs/lc343_matrimonial_property.pdf.

[4] See, for example, BGH, 28.3.2007 – XII ZR 130/04; BGH, 17.10.2007 – XII ZR 96/05; BGH, 12.1.2005 – XII ZR 238/03; BGH, 31.10.2012 – XII ZR 129/10.

[5] IPRG Sec. 27b(1).

[6] EPG Sec. 15 to 17. The 'fault principle' does not imply that fault is the only ground for divorce, but a divorce based on fault is much quicker than divorce based on the breakdown of the marriage.

[7] EGBGB Article 17b(1).

Patchwork of forums and applicable laws

Under conflict of laws, one and the same case, e.g. the unwinding of a marriage, is usually split up into several components, such as divorce, maintenance, property regimes, parental responsibility, etc., each of which has its own conflict-of-laws rule and may potentially be governed by a different national law and even have to be enforced before a different court. This can be illustrated by the following Example.

Example No 8:

Stefan and Monika, both German citizens, marry in Germany. Soon after their marriage, they move to Austria together with their little daughter Sophie. In Austria, they buy a family home worth 300,000 euro, which is solely owned by Stefan and paid for with money Stefan had brought into the marriage. In the course of his midlife crisis Stefan leaves Monika and Sophie and starts a new life in Amsterdam. A year later, Stefan files a petition for divorce in Amsterdam. Throughout the duration of the marriage, Stefan paid a fair portion of his income into private pension schemes, one with an insurance company in Germany and another in Austria. Monika, who stopped working when Sophie was born, has not acquired any pension rights of her own.

Matter:	Jurisdiction:	Applicable law:
Divorce	Netherlands	Netherlands
Maintenance	Austria/Netherlands	Austria
Property in general	Netherlands	Germany
Family home etc.	Netherlands	Germany/Netherlands(?)
Pension schemes	Germany(?)	Germany(?)
Parental responsibility	Austria/Netherlands	Austria

Dutch courts have jurisdiction for the divorce under the Brussels IIa Regulation[2] and will, not participating in Rome III, in the absence of a choice of the applicable law by the parties, apply Dutch law.[3]

Monika can sue Stefan for maintenance before an Austrian or Dutch court under the Maintenance Regulation;[4] according to the 2007 Hague Protocol Austrian maintenance law will apply.[5] Under Austrian law the question of maintenance claims between former spouses largely depends on who the court found to be at fault.[6] This raises an issue as the Dutch courts will not go at all into the matter of fault in the context of divorce.[7] So the court dealing with maintenance will have to inquire, on its own motion, whether it was Stefan or Monika who was primarily responsible for the breakoff of the marriage.

On the assumption that the Matrimonial Property Regulation passes the legislative process, Dutch courts will have jurisdiction concerning matrimonial property,[8] but German law will be the applicable law.[1] However,

[1] LPartG § 15.
[2] Brussels IIa Article 3(1)(a), fifth indent.
[3] https://e-justice.europa.eu/content_divorce-45-nl-nl.do#toc_16.
[4] Maintenance Regulation Article 3(b) and (c). See, however, also Article 13 on related actions.
[5] 2007 Hague Protocol Articles 3 and 5.
[6] EheG Sec. 66 to 68.
[7] https://e-justice.europa.eu/content_divorce-45-nl-nl.do#toc_2.
[8] Compromise text 15275/14 JUSTCIV 281 of 10 November 2014, Article 4(1).

concerning the family home and similar matters, Dutch courts might apply 'overriding mandatory provisions' of the forum.[2]

As to Monika's potential rights to a share in Stefan's pension scheme, there is much uncertainty as to jurisdiction and applicable law, as well as to substantive issues, because the matter is dealt with by unilateral conflict rules.[3] From the point of view of Dutch law, such rights are restricted to Dutch pension schemes, and foreign pension schemes are included only where Dutch law is the law applicable to matrimonial property issues.[4] Under Austrian law, there are no such rights at all, and the matter would be considered as a matter related to maintenance. From the point of view of German law, Monika could rely on *Versorgungsausgleich* only if German law was the law applicable to the divorce under the Rome III regime, which is not the case; by way of exception, Monika could file an application for German *Versorgungsausgleich* before a German court, but only as far as the German pension scheme is concerned.[5] Intricate problems may arise if the Austrian or Dutch court dealing with maintenance under Austrian law treats the matter as a matter of maintenance, and the German court later overlooks this factor and gives Monika rights under *Versorgungsausgleich*, in which case Monika's need for sufficient financial means after retirement would be satisfied twice. Further intricate problems may arise in the context of life insurance schemes, where it is always difficult to decide whether they should be treated like pension schemes or as a matter of matrimonial property. There is again a danger that Monika's needs are either satisfied twice or not at all.

The matter of parental responsibility would normally be dealt with by Austrian courts,[6] but if Monika agrees and it is in the superior interest of the child the Dutch courts, as they are dealing with the divorce, may also decide on parental responsibility.[7] Parental responsibility is governed by Austrian law as the law of Sophie's habitual residence.[8]

Solutions to the problem

The problem of forum shopping is aggravated by the fact that the Brussels IIa Regulation fails to provide a possibility for spouses to designate the competent court by common agreement (*supra* 0, p. 79). This is not only contrary to the trend in other recent EU instruments,[9] but also undermines endeavours by a spouse to make sure in advance they will not find themselves in proceedings in a forum they had never anticipated and to prevent forum shopping and a 'rush to court' on the part of the other spouse.

Thus, in Example No 6, Herbert could not have avoided the problem by a choice of German courts in the pre-nuptial agreement, and nor could Monika in Example No 8 have prevented Stefan from starting proceedings in the Netherlands.

If, in the course of a recast of the Brussels IIa Regulation, a possibility is created for the parties to designate in advance the competent court, forum shopping and a patchwork of forums and applicable laws can in many cases be avoided if the parties, at a point in time before any conflict has arisen, validly agree on the jurisdiction and on the applicable law. Herbert and Mary in Example No 6 would have agreed on Germany as the forum and German law as the law applicable. Stefan and Monika in Example No 8 could have opted either for a 'static' approach and agreed on German law as the law applicable to divorce and maintenance (the other matters except parental responsibility would, in this case, automatically have followed), or for a 'dynamic' approach and

[1] Compromise text Article 28(1)(a). In exceptional cases, the court could, upon request of one of the spouses, apply Austrian law instead on the basis of Article 28(2), but the requirements will probably not be met in the present case.
[2] Compromise text Article 22 and Recital (24f). Strangely, no reference is made to overriding mandatory rules of the place where the assets are located, which would be Austria, cf. Article 30 of the Successions Regulation. This could even be a mistake in the Compromise text.
[3] Compromise text Article 1(ea) exludes these issues from the scope of the Regulation. However, Recital (12a) states that the "Regulation should govern in particular the issue of classification of pension assets, the amounts that have already been paid to one spouse during the marriage, and the possible compensation that would be granted in case of pension subscribed with common assets."
[4] Wet van 28 april 1994, tot vaststelling van regels met betrekking tot de verevening van pensioenrechten bij echtscheiding of scheiding van tafel en bed, Article 1(8).
[5] EGBGB Article 17(3). It is questionable, though, whether this differentiation is compatible with the Treaties.
[6] Brussels IIa Article 8.
[7] Brussels IIa Article 12.
[8] 1996 Hague Convention Articles 15 to 17 in conjunction with Article 5; there is some doubt as to whether this holds true also where Monika accepts, under Brussels IIa Article 12, that the matter is dealt with in the Netherlands.
[9] Report (n. 1), p. 5.

agreed on their last common habitual residence for divorce, maintenance, matrimonial property (possibly even with retroactive effect) and pension schemes (the latter would have amounted to a renunciation of German *Versorgungsausgleich*).

It is only in Example No 7 that, for want of uniform EU conflict rules, Detlef and Dirk cannot validly agree in advance on jurisdiction and applicable law, unless the national rules involved happen to provide for such a possibility.

2.3 Uncertainty for same-sex marriages, registered partnerships and *de facto* cohabitation

EU legislation has, so far, not provided for full coverage concerning applicable law, jurisdiction and enforcement in the areas of family law. This creates uncertainty for types of relationship other than the traditional marriage between a male and a female individual.

Uncertainty for same-sex marriages and registered partnerships

Even if the two Regulations on property regimes enter into force there will still be no uniform rules of jurisdiction and applicable law concerning the dissolution of registered partnerships. This has been illustrated by Example No 3 (François and Amélie, *supra* p. 84) and Example No 7 (Detlef and Dirk, *supra* p. 87)

The same holds true, to a certain extent, for same-sex marriages as it is for the law of the court seised to decide whether it considers the relationship a 'marriage' and applies the Brussels IIa Regulation, the Rome III Regulation, Article 5 of the 2007 Hague Protocol and the future Regulation on matrimonial property or whether it resorts to national rules on conflict of jurisdiction and applicable law concerning divorce, to Article 3 of the Hague Protocol, and to the future Regulation on property consequences of registered partnerships. Naturally, the results will differ significantly.

Example No 9:

José and Manuel are married under Spanish law. They have already lived in Spain for ten years when they move to Germany and establish a new habitual residence there. One year later, the couple splits and seeks a divorce. German courts would establish jurisdiction in any case, but it is a matter of controversy whether they would apply German law (according to Rome III[1]) or Spanish law (according to national conflict rules on registered partnerships[2]) and whether maintenance would be governed by German law (Article 3 of the 2007 Hague Protocol) or Spanish law (Article 5 of the Hague Protocol).

Approaches to *de facto* cohabitation

The approaches taken by Member States' legal systems to *de facto* cohabitation differ to a great extent. Normally, legal systems provide for some degree of recognition when it comes to relations vis-à-vis third parties, e.g. concerning conflicts of interest following from a relationship of intimacy, but also when it comes to certain rights against third parties, such as the right to take over a tenancy contract. A more sensitive issue is whether legal systems also recognise certain legal effects of *de facto* cohabitation as between the parties, in particular when it comes to property relations after the relationship comes to an end.

Roughly speaking, there are three different approaches. Some Member States or parts thereof (e.g. Slovenia, Croatia) consider *de facto* cohabitation as more or less equivalent to marriage where cohabitation meets certain minimum requirements, such as a minimum duration. Another group of Member States or parts thereof (e.g. Finland, Sweden, Scotland) provide for special rules which are designed to avoid situations of gross hardship, in particular when a relationship comes to an end through separation or death. A third group of Member States (e.g. Austria, Belgium, Germany) does not provide for any special rules at all; rather the partners are considered

[1] Rome III Article 8(a).
[2] EGBGB Article 17b(1).

to have deliberately opted against any kind of mutual obligations of a family law nature. In these countries, partners would have to resort to general law of obligations, property and trust and establish possible claims on grounds such as implicit contract, unjustified enrichment (e.g. *condictio causa data causa non secuta*), constructive or resulting trust, or a civil law company.

Jurisdiction and applicable law

Arguably, maintenance claims potentially resulting from de facto cohabitation are covered by the Maintenance Regulation because the formulation "arising from a family relationship … or affinity" is extremely broad. However, it is a matter of controversy whether the special rule in Article 5 of the 2007 Hague Protocol may apply. With relation to registered partnerships the predominant view seems to be that it is for the court seised to decide whether, from the point of view of the law of the forum, a certain relationship qualifies as sufficiently akin to marriage in order to apply Article 5 by analogy or not.[1]

Beyond maintenance, there is still greater uncertainty both as to jurisdiction and to the applicable law. The two pending property law Regulations are clearly not targeted at *de facto* cohabitation, even though, in the light of draft Recital (10), there should be some margin of discretion for Member States such as Slovenia or Croatia to define certain forms of *de facto* cohabitation as 'marriage' where a court of that Member State is seised.

According to its Article 2(2)(a) the recast Brussels I Regulation[2] does not apply to "…rights in property arising … out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage". Similarly, the Rome I Regulation, according to Article 1(2), excludes from its scope "… (b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations; (c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession". A similar exclusion rule is found in Article 1(2) of the Rome II Regulation for non-contractual obligations.

Recital (8) of the Rome I Regulation and Recital (10) of the Rome II Regulation explain that the reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised. There is some controversy as to whether the reference to the law of the Member State in which the court is seised means a reference to that Member State's domestic law or to that Member State's set of conflict of law rules. The latter view is more in line with the wording of the Regulations themselves, but it may trigger a host of intricate legal problems, so the best view is probably to leave it to the law of the court seised to decide whether it wishes to answer the question on the basis of its domestic law or on the basis of the law applicable according to its conflict of law rules.

At the end of the day there is great uncertainty for cohabiting couples in most Member States as to what is the relevant regime when it comes to both jurisdiction and applicable law, and it is basically for the court seised to decide on the basis of its own law whether it chooses to apply the rules of the Brussels I and Rome I and II regimes or national conflict rules concerning jurisdiction and applicable law.

Example No 10:

Fred and Anne, an English unmarried couple, live in the UK together with their three children. Fred buys the family home, and his whole salary is used to pay the mortgage, while Anne's salary pays for all the other expenses. After ten years, the family moves to Vienna. The home in UK is sold and another home is bought in Vienna on the same basis. When the couple splits and Fred leaves for a new job in Brussels, Fred is owner of the house worth 500,000 euros, while Anne has not accumulated any assets at all. There is, in theory, a wide range of potential claims on her part (contract, company,

[1] Bonomi Report, http://www.hcch.net/upload/expl39.pdf, n. 92.

[2] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1.

trust, unjust enrichment, …), but it is entirely unclear whether Anne should sue Fred in Brussels or in Vienna, and which is the applicable law, not to speak of uncertainties under the substantive national rules.

Even where maintenance claims are concerned, there is uncertainty because it is for the court seised to decide whether it considers the partners as sufficiently akin to 'spouses' within the meaning of Article 5 of the 2007 Hague Protocol.

Example No 11:

Assuming that in the setting described in Example No 6 (*supra* p. 85) Lara is not killed, but rather falls in love with another man and breaks off the relationship. Nik, who had given up the excellent job he had in Slovenia in order to follow Lara and support her in her challenging new position in Vienna, never managed to get an adequate job in Austria and depends, at least for a certain period after separation, on Lara's financial support. If Nik sues Lara while he still has his habitual residence in Austria, Austrian courts will apply Austrian law in accordance with Article 3 of the 2007 Hague Protocol and possibly not even consider Article 5, so they will decline any claim for maintenance. Thus Nik has to move back to Slovenia in order to be able to enforce his rights under Slovenian law.

Solutions to the problem

Unfortunately, this problem cannot effectively be addressed by way of party agreement. While there is a certain chance that Member State's courts will be impressed and influenced by such an agreement it could not derogate mandatory national conflict rules.

Therefore, the problems encountered by couples other than the traditional marriage between a man and a woman can only be solved by way of new EU legislation in the field. A comprehensive codification of EU conflict rules for family matters ('EU conflict code in family law') would clearly be the favourable solution.

If this turns out not to be realistic for political reasons, a set of EU model marriage, partnership and cohabitation contracts, to be introduced as a Regulation and derogating existing EU and national rules where necessary, could be an alternative. These model contracts would, in particular for *de facto* cohabiting couples, also contain substantive provisions concerning the mutual rights and obligations where the applicable law is a law that fails to carve out these rights and obligations in a clear and transparent manner.

3. THE POTENTIAL OF EUROPEAN MODEL DISPOSITIONS

KEY FINDINGS

- In most cases, unexpected legal effects of moving to another jurisdiction can be avoided if the parties, in due time before any conflict arises or death occurs, make an informed choice concerning jurisdiction and applicable law under the existing EU instruments. Equally, the problem of there being a patchwork of applicable laws in a standard divorce or separation case can largely be avoided by agreeing in advance on a uniform regime.
- However, only very few couples and individuals make use of the choices they have. The main reasons are that citizens are not sufficiently aware of choice-of-law options, that people tend to block out the possibility of future problems, that it is often difficult to raise the issue in a relationship and that people are not sure they would receive sound legal advice at affordable costs.
- It is therefore suggested that European model dispositions concerning (i) choice of court, (ii) choice of applicable law, and (iii) submission to family mediation are introduced, which citizens must be made aware of and get access to whenever a marriage or registered partnership is concluded, a cross-border change of residence is registered, and in similar situations. They should be accompanied by simple standard information sheets. For divorce and separation cases, they should reduce complexity and offer to the parties a limited set of recommended 'one-stop shop packages'. To make them work effectively, minor modifications in the Brussels IIa Regulation and in the pending Regulations on property regimes would be required.
- The model dispositions would ensure that citizens are made aware of their options and that they have access to choice of court and/or law agreements at affordable costs. As it would be an impartial third party, e.g. a national authority, raising the issue it would also be much easier for parties to discuss the matter among themselves. The models would be a step towards ensuring European citizens can make use of their freedoms irrespective of their mobility, budget and educational background.
- The problems encountered by same-sex spouses, registered partners and *de facto* cohabiting couples cannot effectively be solved by way of party agreement under the existing instruments. A comprehensive codification of EU conflict rules for family matters ('EU conflict code in family law') would clearly be the favourable solution. If this turns out not to be realistic for political reasons, a set of EU model marriage, partnership and cohabitation contracts, to be introduced as a Regulation and derogating existing EU and national rules where necessary, could be an alternative.

3.1 The untapped potential of party autonomy

As has been demonstrated in the previous Chapter (*supra* at 0, p. 86, and 0, p. 89), many of the problems faced by European families with a transnational element could be solved by way of early choice of court and applicable law, 'early' meaning in family law matters long before any conflict has arisen, and in matters relating to succession definitely before the individual has reached a state of incapacity. Even though the existing EU instruments in the field would largely allow parties to designate the competent jurisdiction and/or the applicable law and therefore to avoid many of the problems encountered by transnational families, only very few people make use of these options. There are various reasons why this is the case.

The main reason is that citizens are not sufficiently aware of choice-of-law options. There is no requirement under most Member States' laws that citizens receive any specific legal information upon, for instance, the conclusion of a marriage or the registration of a new residence in another country, and citizens can certainly not be expected to have or procure this information by themselves.

Other reasons are more of a psychological nature. Most people tend to block out the possibility of future problems in a relationship, and equally the possibility that they might unexpectedly lose their lives. Also, it is usually very difficult for one partner in a relationship to raise such issues as this might give rise to the impression that he or she is trying to get an unfair advantage over the other partner.

Obviously, the matter also has a cost dimension as it is expensive to get sound legal advice in cross-border issues, and parties are often afraid of those costs which are difficult to estimate in advance.

3.2 The idea of European model dispositions

This is why it is suggested to introduce European model dispositions and to make sure citizens are made aware of these options and are effectively put in a position to make informed choices at affordable costs.

Content

The European model dispositions, which would be bilateral agreements in family law and could be bilateral or unilateral dispositions upon death in succession law, should cover choice of court and applicable law in matters of separation and divorce, matrimonial property, maintenance and succession. Due attention must be given to cases involving third countries and EU Member States not participating in one or several of the relevant EU Regulations in force.

A matter of special concern must be retirement or disability pension (and related life insurance) schemes, which some Member States treat as an issue of matrimonial property, but other Member States as an issue of maintenance or as an issue *sui generis*.[1] Much depends in this respect on the approach that will finally be taken by the Regulation on matrimonial property (see *infra* at 0., p. 95).

Coincidence between *forum* and *ius*, i.e. between jurisdiction and applicable law, and coincidence of applicable laws, tends to facilitate effective access to justice by accelerating proceedings, reducing costs and improving the quality of judgments. In family law cases, the model dispositions could help reduce complexity by offering to the parties a limited set of recommended 'one-stop shop packages'. For example, there could be a 'static' model designating as applicable, as far as ever possible, the law of a particular Member State with which the parties are closely connected when the marriage is concluded. There could also be a 'dynamic' model, designating as applicable, as far as ever possible the law of the spouses' last common habitual residence.

It might be advisable to include also a clause concerning submission to family mediation. It is true that, in line with the rather cautious approach taken by the Mediation Directive[2] and most national laws a Member State's court is not necessarily under a duty to stay proceedings where the parties have agreed to use mediation before going to court. This is why, as the Brussels IIa Regulation currently stands (but see *infra* at 0., p.95 concerning a possible recast), it is not clear whether a mediation clause would ultimately be enforceable. However, including such a clause would definitely enhance chances that mediation will finally take place before the matter goes to court.

Presentation

To ensure that parties are made aware of and get access to the model dispositions they should be confronted with the option by the national authorities whenever a marriage or registered partnership is concluded, a cross-border change of residence is registered, a passport is renewed, and in similar situations. As it would be a third and impartial party, i.e. a national authority that raises the issue and recommends an agreement it would also be much easier for parties to discuss the matter among themselves.

The model forms should be accompanied by a simple standard information sheet. They should allow for sufficient options by the parties, and be made available in all official languages of the EU.

As many Member States require a notarial deed or a similar form, and as the parties should not be discouraged from seeking expert advice and possibly from including other provisions in their agreement, it may be advisable to involve a notary or, in States without a notarial profession, an equivalent legal professional. However, the notary would have to offer the service at a fixed and very moderate rate, which is made known to the parties in advance on the information sheet.

[1] See n. 3 for the approach taken by the Compromise text concerning matrimonial property.

[2] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 24.5.2008, OJ L 136, p. 3. For the ongoing work on a recast of the Mediation Directive see http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf

Required legislative measures

Ideally the model dispositions should be taken up by the European legislator in the form of a Regulation, ensuring that they are accepted throughout the EU and that parties are made aware of and get access to the model whenever a marriage or registered partnership is concluded, a cross-border change of residence is registered, and in similar situations (*supra* 0, p.94). If it is not taken up by the European legislator it could still be made available to the public, with or without the support of national governments and/or legislators, and serve as a useful tool for transnational couples who would otherwise not have thought about a choice of law or would not have afforded legal advice.

In order to make the model dispositions fully effective and to allow for enforcement of mediation clauses (*supra* 0, p. 94) as well as for the 'dynamic model' described above (at 0, p. 94), the following additional legislative measures would need to be taken in the context of the imminent Brussels IIa recast:

- a possibility for the parties to choose, inter alia, the courts of the Member State of the last common habitual residence at the time the agreement is concluded *or the court is seised*;[1]
- a duty of a Member State's court to stay proceedings where the parties have agreed to use mediation before going to court and the mediation clause satisfies particular minimum requirements.

In the context of the finalisation of the Regulations on property regimes, the following minimum measures would need to be taken:

- a possibility for the parties to choose, inter alia, the law of the Member State of the last common habitual residence *at the time the court is seised*;[2]
- the inclusion of pension schemes into the scope of the Regulations at least insofar as the parties may choose the court and applicable law.

3.3 Towards an 'EU conflict code in family law'?

The suggestions made so far are a step towards overcoming some, but not all barriers currently encountered by families with a transnational element in the EU. It is in particular the uncertainty faced by same-sex spouses, registered partners and, even more so, *de facto* cohabiting couples that cannot effectively be addressed by party agreement.

What would be the preferable solution would be an 'EU conflict code in family law', i.e. a codification of the existing instruments, that would close gaps and remove inconsistencies. Such 'EU conflict code in family law' would be without prejudice to more far-reaching plans to have a comprehensive codification of EU conflict rules across the board. If this is politically not feasible, separate conflict rules for same-sex spouses, registered partners and *de facto* cohabiting couples could be introduced.

If even this turns out not to be realistic for political reasons, a set of EU model marriage, partnership and cohabitation contracts, to be introduced as a Regulation and derogating existing EU and national rules where necessary, could be an alternative.

[1] This would make sure that at least in the Member States bound by the Rome III Regulation the law of that Member State is applied to divorce. It would also make sure that the parties can indirectly choose this law as the law applicable to maintenance, cf. Article 8(1)(d) of the 2007 Hague Protocol.

[2] More recent instruments, notably the Maintenance Regulation (concerning choice of court) and the Succession Regulation (concerning choice of law) refer alternatively to the habitual residence etc. at the time the choice is made *or the court is seised*. This is the preferable approach because otherwise parties would, strictly speaking not be in a position to choose their future common habitual residence when they move to another State, but would have to wait until the new habitual residence has been clearly established.

Biography

Christiane Wendehorst is Professor of Law at the University of Vienna. As an expert of private law she is a Member of the Austrian Academy of Sciences (ÖAW), of the International Academy of Comparative Law (IACL), of the American Law Institute (ALI) and of various international research groups. Before coming to Vienna, she had held chairs at German universities for more than ten years and served, inter alia, as Managing Director of the Sino-German Institute for Legal Studies. Christiane is author of numerous articles in law journals, books and commentaries, in particular in the fields of European Private Law and Private International Law. She is Vice-President of the European Law Institute (ELI), which she was actively involved in setting up, and one of the ELI's Founding Members.

Session I - Less paper work for mobile citizens

EU Regulation 650/2012 on successions and on the creation of a European Certificate of Succession

Kurt Lechner

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LIST OF ABBREVIATIONS

TFEU	Treaty on the Functioning of the European Union
BGB	German Civil Code of 1 January 1900
Brussels II Regulation	Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility
CNEU	Council of Notariats of the European Union
EGBGB	Introductory Law to the German Civil Code of 18 August 1896
ECS	European Certificate of Succession
Rec.	Recital
EU Succession Regulation	REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July 2012 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
EU Maintenance Regulation	Regulation No 4/2009 of the Council of 18 December 2008 on international jurisdiction, recognition and enforcement of foreign decisions
IPL	international private law
Rome I Regulation	REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations
Rome II Regulation	REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations
Rome III Regulation	COUNCIL REGULATION (EC) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation
Hague Convention	Hague Convention of 1961 on the Form of Testamentary Dispositions
Maintenance Regulation	COUNCIL REGULATION (EU) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in maintenance matters

EXECUTIVE SUMMARY

The European Succession Regulation establishes for people in 25 (!) EU Member States (citizens and third-country nationals) a standard, closed and new conflict-of-laws regime in succession law. While protecting powers and subsidiarity, substantive succession laws, national procedures and certificates of inheritance remain unaffected. The key principles of the Regulation – convergence of jurisdiction and applicable law, unity of succession, private autonomy and liberality, unaffectedness of the national legal systems and favor testamenti – are the yardstick of its interpretation in isolation from the Regulation.

Succession rules and other rules, such as in particular the rules on donations, personal status and family situations, but especially on property law, affect and overlap each other, though the latter are subject to the non-harmonised autonomous national conflict-of-laws systems with differing emphasis and scope. With a multitude of possible configurations, differentiation must occur via legal practice. When raising these preliminary questions it is preferable in the interests of European consistency of decisions and the effectiveness of the European Certificate of Succession to opt for dependent connections. Clarification of this matter by means of in-depth studies, possibly in a general section of European IPL would also be just as advisable as further harmonisation of partial areas of IPL, in particular adopting the matrimonial property regime Regulation (COM (2011)/126 and 127).

Convergence is largely achieved, though the approval of the parties/those involved is required in the case of a choice of law. Defining this group of people can be uncertain. The testator should – de lege ferenda – be entitled to organise jurisdiction in the Member State at the same time as making his choice of law. Convergence would therefore be substantially reinforced and uncertainties eliminated.

The combination of habitual place of residence and choice of law as connecting factors for determining the applicable law and jurisdiction is a concept which has not been successful. The concept of the habitual place of residence is adequately expanded upon by the Recitals and remain flexible and adaptable. It is to be applied uniformly within the EU Succession Regulation; compared to other EU Regulations (e.g. EU Maintenance Regulation), various fine differentiations are possible in cases on the borderline of the concept.
Permitting a choice of law is used for the purposes of legal security, takes private autonomy and testamentary freedom into account and reconciles the unfamiliar and new connecting factor to the habitual place of residence. The barriers for recognition of an implied choice of law should not be set too high. In the short term the choice of law at the place of habitual residence should be permitted within strict limits.

Application of ordre public should be excluded within the circle of Member States, from the viewpoint not only of discrimination but also of the reserved share. Otherwise doubt would be cast on legal security, the ability to plan one's succession and the effet utile of the EU Succession Regulation.

The admissibility and validity – and in the case of agreements as to succession, also the binding effect – of dispositions of property upon death because of a change of rules is guaranteed within the Member States by means of the connection to the rules under which the dispositions are made; the formal validity by Article 27 and possibly the Hague Convention. All agreements with binding effect, joint and mutual wills, are to be seen as agreements as to succession. The autonomous right to choose the rules under which the dispositions are made reinforces the freedom to make arrangements but places increased demands on testators and advisors. The rules applicable to the succession continue to depend on the last habitual residence or a choice of law under Article 22 of the EU Succession Regulation.

The European Certificate of Succession (ECS) benefits heirs by making it significantly easier for them in the event of executing, settling or administering a succession with assets in more than one Member State. The continued application of national inheritance certificates does not affect the national legal systems and increases the freedom of choice of citizens. Uncertainties about the importance of the certified copy of the ECS and where more than one ECS exists with different content may also have an adverse effect on acceptance of the ECS, as may the extensive and unmanageably complicated forms for applying for and issuing the ECS. We shall have to wait and see what happens in practice.

Conventions with third States take priority over the EU Succession Regulation in accordance with Article 351 of the TFEU. The conflicts arising therefrom could be serious. Irrespective of the question of authority, the EU and the Member States affected should renegotiate or terminate the conventions as soon as possible.

The transitional provisions in Article 83 of the EU Succession Regulation place great value on the idea of favor testamenti, protection of the trust of citizens in the continued validity of the dispositions of property upon death which they have set up – including a choice of law. It is therefore to be interpreted broadly.

The EU Succession Regulation is another large step in an impressive and successful range of EU Regulations on IPL and the creation of the European judicial area. It can be the model for further – desirable – harmonisations of IPL. It brings a palpable benefit to citizens when exercising their basic freedoms, increased testamentary freedom and increased opportunities to organise their succession in a legally secure way, which they should use responsibly. Information about the various legal systems is essential. Citizens and advisors should be made more aware of the existing possibilities such as the European Judicial Network1 and the inheritance portal of the CNEU.2 The increased points of contact of the substantive law national legal systems may introduce a gradual, cautious convergence. Many problems are due to conflicts of goals. Necessary differentiations and concept clarifications are inherent in the complex subject and, like existing matters of doubt, will have to be clarified by case law and doctrine. The experience and results of legal practice should be awaited before any revision.

1. INTRODUCTION

The EU Succession Regulation is 'Une véritable révolution' from the French point of view, according to Prof. Paul Lagarde who, along with Prof. Dörner, was one of the co-authors of the radical and ground-breaking study by the Deutsche Notarinstitut in 2002. [3] Not only 'from the French point of view', it should be added, but also from the point of view of all the Member States taking part. In view of the great importance of this total reshaping of IPL in the field of succession law, it is no surprise that there have since been an enormous number of doctrinal contributions which, with the scientific meticulousness of ratio legis, examine the concepts and their interpretation, the loopholes, weaknesses and pitfalls, in some cases even ferreting out remote cases. By way of an illustration, reference is made merely to the abridged bibliography in the commentary on 'Le droit européen des successions' by Bonomi/Wautelet, 2013, and the literary references in NK-NachfolgeR/Köhler 2015 EU Succession Regulation, pp. 1487–1491.

1.1.

In order to classify this radical reshaping it is necessary to briefly outline the legal and factual situation before 17 August 2015 and recall when from this day, ignoring repercussions, it will be completed.

The autonomous conflict-of-laws regimes of Member States regarding succession law are linked variously to: Nationality on the one hand, whether alone or in conjunction with choice of law, and habitual residence on the other in conjunction with the lex rei sitae in the case of property ownership, to name just the commonest basic patterns; renvoi is handled differently, rights to choose are granted in some places, refused in others, concepts have different meanings, as do procedures and certificates of inheritance, the rules themselves are often only codified in a very rudimentary way. Consequently there is international dissent, fragmentation of successions and no recognition of reciprocal decisions and multiple procedures are necessary to prove succession, resulting in costs and lost time. Apart from the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions of 5 October 1961 (which has not been ratified by all Member States), there is no other convention worth mentioning. The Hague Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons has not come into force and has only been adopted by the Netherlands as its IPL.[4] This 'cacophony' affects – and the figures are rising – some 13 million European citizens who live in a European country other than their country of origin, are furthermore all citizens with assets in other Member States, it also affects binational marriages, which are not only weighed down with uncertainties about their matrimonial property regime but are also unable to make joint and legally secure plans for their

[1] https:// e-justice.europa.eu
[2] www.successions-europe.eu
[3] Rev.crit. 2012, p. 691
[4] See Süß 2nd edition country report on the Netherlands

succession. This legal and factual situation is intolerable; intolerable for those people who wish to organise their succession, for the advisors who are expected to know not only about the different inheritance systems but also about the various conflict-of-laws regimes, and also intolerable because of the often unresolvable contradictions (dissent) and unclear legal positions, because of the costs and – what is especially prejudicial in succession cases – lost time for the heirs; finally, it is also difficult and unwieldy for the authorities and courts responsible for dealing with succession cases.

1.2.

Chapter 2 below will give a brief presentation of the EU Succession Regulation and describe the central principles on which it is based, then Chapter 3 will deal with some general questions and stumbling blocks across the board, followed in subsequent chapters by a presentation of some selected problems and points for discussion in the same order as the chapters in the EU Succession Regulation, with the focus to be on aspects of importance for implementing the Regulation.

2. THE SUCCESSION REGULATION – KEY PRINCIPLES AND ASSESSMENTS

2.1.

With effect from 17 August 2015 the European Succession Regulation[1] replaces the national rules on conflict of laws of 25 EU Member States in succession law. Unlike other IPL regulations, it serves as an overall solution governing applicable law, jurisdiction and recognition and enforcement of decisions, it contains provisions on the acceptance of authentic instruments, creates for the first time a European Certificate of Succession and protects by means of transitional provisions the continued validity of earlier depositions.

The central provision of the connecting factors for applicable law and jurisdiction is achieved by means of a combination of habitual residence and choice of law as cornerstones. The applicable law of succession is generally speaking the law of the State in which the testator had his habitual residence at the time of his death. This is also the State in which jurisdiction lies. The testator has the right, however, to choose the law of his country of origin (the law of the State of his nationality); with the consent of the persons involved in the succession, jurisdiction then also lies in this country of origin (convergence). Linking the admissibility and validity of a disposition upon death to the country in which the disposition was made ensures their validity even in the event of a change of status (planning and legal security). The validity of the form is largely ensured. The applicable law applies to the succession as a whole (no fragmentation of successions), to third-country nationals and to third States (universal). It is on this basis that decisions are recognised and enforced. The European Certificate of Succession, as evidence with cross-border legal validity and protection of good faith in legal matters, makes it easier for the heirs, legatees, executors and administrators of the succession to exercise their rights.

The United Kingdom, Ireland and Denmark are not parties to the Regulation and are to be considered as third States.

2.2.

The fundamental principles[2] of private autonomy, uniformity of succession, convergence of jurisdiction and applicable law are immediately apparent. The EU Succession Regulation is also to be applied when the habitual place of residence is a third State and the choice of law is made by a third-country national; it applies for the whole of the succession, to movable and immovable property, wherever it is located – including in a third State

[1] Regulation (EU) No 650/2012 of 4 July 2012 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, ABl. (EU) No L 201 of 27 July 2012, p. 107.

[2] Bonomi in Bonomi/Wautelet, introduction, marginal notes 23 et seq., Lagarde op. cit. p. 692

(uniformity of succession). Apart from exceptions, fragmentations of successions are therefore generally excluded. However, international dissent remains a possibility – in relation to third States.

By making it possible for those involved, in the case of a choice of law, to invoke the jurisdiction of a court in the relevant country of origin, and this jurisdiction alone, the convergence of court and applicable law is achieved in most cases.
The EU Succession Regulation reinforces private autonomy and expands the self-determination of citizens in terms of their freedom to dispose of property upon disposition and freedom of choice. This is expressed not only in choosing the country of origin and applicable law but also in the link to the habitual place of residence, which citizens are free to choose; as well as in the decision-making powers of heirs in Chapter II, the settlement of the estate and the choice of law in Article 24(2) and Article 25(3) of the EU Succession Regulation. It is characterised by 'l'esprit libéral'.[1]

Another principle governing the Succession Regulation (Article 81 of the TFEU) is the attempt to adversely affect the sensitive matter of the substantive law of succession of Member States and other property law as little as possible. The legitimation effect and protection of good faith (Article 69 of the EU Succession Regulation) is essential for the usefulness of the ECS as a competence ancillary. The new conflict-of-laws rules also have indirect effects on national legal systems. The expanded options of citizens/testators affect the law of succession (to date guaranteed by linking to nationality or the lex rei sitae) and in particular the law of the Member States related to reserved shares. With the choice of law restricted to the law of the country of origin but also in Article 1(2)(b) and (g) (… without prejudice …) the reserved shares are protected. Articles 2 and 62 and Recitals (29) and (36) of the EU Succession Regulation (continued existence of national procedures for certificates of inheritance) also take this important issue into account.

The joint, closed conflict-of-laws regime will bring the substantive succession laws of Member States closer to one another and could thus herald the start of a convergence, which is preferable, in this matter that characterises the legal culture of a country, to harmonisation 'from above'.[2]

Favor testamenti is obviously a marked fundamental value of the Succession Regulation. Not only can its effects be felt in the transitional provisions of Article 83 of the EU Succession Regulation but they are also expressed in Article 22(2) (implied choice of law) and Articles 24 to 28 of the EU Succession Regulation.

2.3.

The Succession Regulation is a completely new creation, not an enhancement of existing legislation or conventions. Therefore the EU Succession Regulation is not subject only to the principle of interpretation in isolation from the Regulation, and an occasional look at other language versions (all language versions are binding) can be useful here. Most particularly here is that the spirit and purpose (telos) of their rules must be intrinsically understood and interpreted from the interplay of concepts and the assessments of the legislator, for which the development of the legislative process can also be made productive.[3] Analyses from the viewpoint, dogma, traditions and concepts of national legal systems are not unnecessary and can help improve understanding, though they are only of limited value. Legal institutions such as choice of law, connection to habitual residence, agreements as to succession, certificate of inheritance with the protection of good faith are new for many Member States or have until now been refused by them. These legal institutions take on a different meaning in the context of the EU Succession Regulation.

[1] Bonomi in Bonomi/Wautelet, introduction, marginal note 26
[2] Bonomi op. cit. marginal note 26
[3] See NK-NachfolgeR/Köhler EU Succession Regulation, p. 1494, which admittedly ignores the publicly accessible tests with reports, applications and decisions of the European Parliament (e.g. on the EU Succession Regulation decision of the European Parliament's Committee on Legal Affairs of 11 October 2011); See Lechner IRax 2013, p. 498; likewise in Dutta/Herrler DNotI 2013

3. PROBLEMS AND PITFALLS ACROSS THE SUCCESSION REGULATION

Some of the questions, problems and pitfalls of the Regulation are discussed below, without any claim to be comprehensive.

3.1.

The United Kingdom and Ireland have not declared an 'opt-in'. As a general rule, Denmark does not take part in legal acts of this kind. The Regulation mentions this in Recitals (82) and (83) but has declined to expressly state which States are to be seen as Member States, in contrast to e.g. Rome I Regulation (Article 1 (4)) and Rome III Regulation (Article 3 (1)). No inferences or doubts should be possible on grounds of differences in legislative technique and terminology. Only the 25 Member States now taking part can be considered as 'Member States'. If the United Kingdom and Ireland declare an opt-in, which they are free to do and would also be desirable, then they too would be treated as Member States. At the current time, and if necessary until then, the United Kingdom, Ireland and Denmark are to be seen as third States in all matters related to the EU Succession Regulation. The provisions of the EU Succession Regulation are aligned with each another, dependent on each other and do not of themselves have any real purpose, even if in individual cases they could conceivably apply.[1]

3.2.

A testator with assets in more than one Member State (or his heirs) can, in spite of the unrestricted validity of the EU Succession Regulation, be confronted with unexpected problems. If the testator has made provision in a disposition upon death on the grounds of property law concepts familiar to him, e.g. rights of abode, usufruct rights, liens and the like, which in the Member State in question do not come under property law in this form, they cannot be transferred on a one-to-one basis (Article 1(2)(k) of the EU Succession Regulation numerus clausus). In cases of doubt the disposition will not actually fail. An adjustment/adaptation (Article 31 of the EU Succession Regulation) can, however, be associated with uncertainties and disputes. This applies all the more if assets are located in third countries.

3.3.

If a testator bases a disposition upon death on the succession rules of the place of his habitual residence, a later change in the applicable law (succession rules are the law at the habitual residence at the time of death) can undermine his disposition. On the one hand, the rights to reserved shares/compulsory rights of inheritance under the rules of succession are applicable in this case; furthermore, legal concepts may be unknown or even prohibited in the applicable succession rules, or at the very least may be difficult to implement (e.g. waivers of inheritance and reserved shares, pre- and post-succession, execution of wills etc.).[2]

While a choice of law can provide legal security to a large extent, these questions should still be considered.

A testator who on no account wishes to choose the law of his country of origin because, for example (as a citizen of a third State or even as a citizen of a Member State), he has integrated into the society and legal system of his place of residence, can on no account choose the law of his habitual place of residence (which is often seen as the weak point of the Regulation).

3.4.

Most problems are caused by conflicts and are inherent in the complex subject. They can be controlled by means of clever dispositions and not using risky constructions (which the court with jurisdiction can in the end refuse under certain circumstances).

There should not be any problems with ordre public or fraude à la loi within the circles of the Member States.

[1] Now probably general opinion, see Bonomi/Wautelet, introduction, pp. 13 et seq.; Dutta in FamRZ, 2013, p. 3

[2] See on this under Article 25 and Bonomi/Öztürk in Dutta/Herrler DNotI marginal notes 44–50

3.5.

The Succession Regulation is also applicable if the right of a third State applies (universal application under Article 20 of the EU Succession Regulation). The choice of law of a citizen of a third State therefore has to be taken into account and conversely the habitual place of residence in a third State. Fragmentations of successions will arise only in exceptional circumstances (Article 34 of the EU Succession Regulation). From the point of view of the EU Succession Regulation, the rules also apply to assets in third States (unit of succession). From the point of view of the third States, their conflict-of-laws regimes apply, which may still in future result in a dissent. Note that, with regard to the United Kingdom, Ireland and Denmark as well as the United States, the habitual residence and domicile are not the same.

3.6.

Although it is expressly stated in Article 1(1), sentence 2, of the EU Succession Regulation, reference must be emphatically made based on the experience of conferences, discussions and talks to the fact that the EU Succession Regulation is not applicable to tax matters, but can very much lead indirectly to tax problems because of the changed succession. Thankfully the Commission has set up a task force on this issue. Based on previous experience we can unfortunately not expect the Member States to be prepared to reach truly constructive joint solutions at European level, e.g. a framework directive.

3.7.

Conventions with third States take precedence according to Article 351 of the TFEU in conjunction with Article 75 of the EU Succession Regulation, which can lead to significant conflicts.[1]

3.8.

It is regrettable that Member States clearly do not go to any particular effort to inform their citizens.

Even if nothing changes for the vast majority of citizens, a suitable explanation should still be given on the duty of care of the institutions in the Member States.

4. SCOPE (ARTICLE 1 OF THE EU SUCCESSION REGULATION)

Article 1 of the EU Succession Regulation contains extremely important provisions on the factual scope of the Succession Regulation and contains considerable potential for conflict. Paragraph (1) describes positively the application 'to the estates of deceased persons', the concept of which is defined in Article 3(1)(a) of the EU Succession Regulation. This general positive description is set out in more detail in Article 1(2) of the EU Succession Regulation by means of a negative differentiation of the legal areas which do not fall within the scope and is again positively expanded and differentiated in Article 23 of the EU Succession Regulation. The scope of both the succession rules and the other rules listed in Article 1(2) of the EU Succession Regulation differs in the IPL of the Member States, resulting in overlaps and contradictory results. While the differentiation cannot be made without taking into account the legal systems of the Member States and the spirit and purpose thereof, the qualification as a Member State should nevertheless not be taken over but instead occurs autonomously under European law.

4.1.

A central problem when differentiating the law is what is known as the autonomous or non-autonomous connecting factor of incidental questions. Answering these is of particular importance in succession cases, e.g. because personal status and matters of family and relationship status and in particular of the matrimonial property regime are of considerable importance for settling the succession. The conflict-of-laws regimes of Member States related to these rules (personal rules, marital property law rules etc.) have not been

[1] See Chapter 12 below

standardised, with the result that the assessment can vary even with the same factual situation, e.g. a German/French couple is married under the German property rules from the viewpoint of German marital property law and under the French rules from the viewpoint of French marital property law. The convergence of jurisdiction and applicable law will in future mean that in most cases the lex fori (law of the court with jurisdiction) and the lex causae (applicable law of succession) will be the same, so the number of conflict cases will decline but not completely disappear. Autonomous connection, i.e. the application by the court of its own law (lex fori), which is currently the predominant practice, serves to ensure consistency of decisions within the State. Non-autonomous connection, however, i.e. assessment from the same point of view under conflict of laws as for the applicable succession law (lex causae), serves to ensure consistency of decisions at European level.

Under the EU Succession Regulation and in the interests of the effet utile and because of the importance of the cross-border European Certificate of Succession in good faith, all courts and authorities within the scope of application of EU Succession Regulation should come to the same result. For this reason, priority is to be given in any case to this non-autonomous connection of incidental questions in applying the EU Succession Regulation.[1] The EU Succession Regulation was unable to decide this question because it is of importance with regard to other Regulations (e.g. Rome I and Rome II). This is one of the themes which should be considered when attempting to find a standardised solution (in a general part of IPL).

4.2.

Even in the case of non-autonomous connecting factors, difficult questions remain in the intersection between succession law and matrimonial property law if the property law of various legal systems is to be applied; e.g. from the viewpoint of the French court, the deceased German spouse (irrespective of whether connected autonomously or non-autonomously) is subject to French succession law (habitual place of residence) and German matrimonial property law under § 1371(1) BGB. The death of a spouse is in many legal systems linked to property consequences that fall under succession law or matrimonial property law or both. This problem was to a large extent dealt with by the adoption of the Commission's proposals on matrimonial property law of 16 March 2011 – COM (2011) 126 and 127, but not totally dispelled. The problem can only be mentioned here and outlined using section 1371(1) of the German Civil Code (BGB) as an example. According to this provision, upon the death of a spouse living under the German system of matrimonial property law the statutory share of the estate specified in section 1931 BGB of the surviving spouse is increased by a flat quarter, with any gain (under matrimonial property law) being offset without this quarter being shown in the German certificate of succession, i.e. it merges with the estate under succession law. This rule is simple, serves to ensure legal concord and – in Germany – continues to be accepted, but in succession cases with cross-border elements raises difficult questions which have not yet been conclusively clarified under German law.[2]

If the – indeed correct – classification of this quarter as coming under matrimonial property law is declared by case law (CJEU), the question is settled after treatment in the European Certificate of Succession. The protection of good faith by the European Certificate of Succession affects only succession law, not matrimonial property law. The EU Succession Regulation considers this problem in Recital (12), but without clarifying it, and the form for the European Certificate of Succession (see Chapter 12 below) does not comment on this. The European Certificate of Succession correctly adopts this quarter from section 1371(1) BGB and shows it with a reference to its classification under matrimonial property law.

4.3.

While Article 1(2)(f) does not pose a problem, with the validity of verbal dispositions upon death not being included within the scope of application (in this respect Member States retain their own autonomous conflict-of-laws regimes, such as the Hague Convention), doubts exist as to the meaning of (g) in conjunction with Article 23(2)(i). According to Article 23(2)(i), any obligation to restore or account for donations, advancements or

[1] According to Dörner in ZEV 2012, pp. 512, 513

[2] See Dörner in Dutta/Herrler DNotI pp. 71-83, Kowalczyk in ZfRV 2013, pp. 126 et seq.; Walther in GPR 2014, pp. 325 et seq.; Dutta in FamRZ, 2013, p. 5; see on the problem, Max Planck Institute, Rabels Z. 2010, pp. 522 et seq.; Herzog ErbR 2013, pp. 1 et seq.; Dörner in ZEV 2012, p. 508, Simon/Buschbaum NJW 2012 2.393, 2394, Thorn in Palandt EU Succession Regulation Article 1 marginal note 1

legacies when determining the shares of the different beneficiaries falls within the scope of application. Donations, advancements or legacies made inter vivos can, however, not only trigger obligations to restore between legatees but also restitution claims against third parties, the recipients of the donations, advancements or legacies. These restitution claims were one of the reasons why the United Kingdom has not opted in (clawback).[1] Repayment claims in respect of donations made inter vivos against third parties not involved in the succession would then be subject to the law on donations and not the succession law. This interpretation does not meet the requirements of the EU Succession Regulation. Besides (i), reference must also be made to (h), under which 'reserved shares and the other restrictions on testamentary freedom' expressly fall within the scope of application. One of the fundamental concerns of the EU Succession Regulation, to leave the reserved shares and compulsory rights of inheritance of Member States and the rights and claims arising therefrom untouched, would be greatly infringed, leaving the door wide open to evasion. This is why the proposal to set up a separate hypothetical succession law for donations inter vivos, was also rejected. Therefore, claims to additional reserved shares and other claims for repayment arising out of donations, advancements or legacies made inter vivos also fall within the scope of the EU Succession Regulation. [2]

4.4.

While Article 1(2)(k) (numerus clausus of rights in rem) in conjunction with Article 31 of the EU Succession Regulation (adjustment/adaption) is fundamentally not a problem, the problem dealt with in (l) has kept legislative advisors busy. In this respect reference is made to the extensive literature[3] and only the following comments are made. (l) refers to two different circumstances: the procedure for making entries in the register (register law) on the one hand and the effect of entering or not entering property rights in a register (property law rules) on the other. The Council wanted to have this treated as two separate points, which was unfortunately not done. The European Parliament provided further clarification of this question in the decision of the Committee on Legal Affairs of 11 October 2011 by means of its own 'Article 20a'. It is clear from the wording of (l) in conjunction with Recitals (18) and (19) and the comparison with Article 1(3)(j) in the Commission's final proposal COM (2009) 154 that the EU Succession Regulation places considerable importance on the integrity of the register and protection of transactions. When transferring and creating (rights of residence among others) rights to property (mainly real estate), which have to be entered in the register, the rules of succession take second place behind property law when it comes to execution under property law. The alteration of a right is not complete until it is entered in the register (land register). In the case of other property in the estate which is not included in a register, the transfer takes place entirely in accordance with the law of succession. Any other interpretation would deprive (l) of its meaning. There is no change to the allocation of the property: only the final execution needs an additional legal security and protection of the register and of the act used for the transaction. No excessive 'bureaucracy' is visible there. Instead we can expect delays locally because of uncertainties about the legal situation and with registrars, as well as because of fears regarding liability.

5. DEFINITIONS

In spite of knowing about the interpretation in isolation from the Regulation, terms can give rise to difficulties of interpretation especially because the national meaning of the term is involved when the same word is used. For example, this is the case with the term 'agreement as to succession' and 'joint will', which is discussed with reference to Article 25 of the EU Succession Regulation below.

The term 'decision' in Article 3(1)(g) is to be understood in conjunction with 'court' in Article 3(2), as shown in (g) 'any decision in a matter of succession given by a court of a Member State …'. It must be a decision by a

[1] See Lorenz in Dutta/Herrler DNotI 2013

[2] See also Max Planck Institute, 2010, 522, p. 631, No 176; Herzog ErbR 2013, p. 3

[3] See Dörner ZEV 2012, p. 509; Simon/Buschbaum NJW 2012, pp. 2393 et seq.; Dutta in FamRZ, 2013, p. 12; Schmidt Rabels Z. 2013, pp. 1 et seq.; Lechner IPrax 2013, pp. 497 et seq.; Margonsky GPR 2013, pp. 106 et seq., Hertel in Dutta/Herrler DnotI Nos 7 et seq.; Thorn in Palandt, EU Succession Regulation, Article 1, marginal notes 15, 16, Wilsch ZEV 2012, pp. 530 et seq.

court within the meaning of Article 3(2) of the EU Succession Regulation, and specifically a decision of a Member State (not a third State), and it must have been issued in 'matters of succession', which is to be understood in the context of Articles 39 et seq. of the EU Succession Regulation. Decisions in contentious/adversarial proceedings which are obviously the focus of Articles 39 et seq.[1] are to be completely and indisputably subsumed, but decisions in non-contentious proceedings can also fall under it (Recital (59)). The key point is that the judicial body itself decides the matters in dispute independently, which is why court settlements – the agreement of which depends on the will of the parties – do not fall under (g) but instead under (h) and not under Articles 39 et seq. but under Article 61 of the EU Succession Regulation.

6. JURISDICTION (ARTICLES 4 TO 19 OF THE EU SUCCESSION REGULATION)

Articles 4 to 19 of the EU Succession Regulation govern the international jurisdiction for 'courts'; local, factual and functional jurisdictions remain matters for the Member States.

Generally speaking, jurisdiction is linked to the habitual residence of the testator at the time of death. In the case of a choice of law, the convergence can be provided by the jurisdiction of a court in the Member State of the chosen law, but this depends on the prorogation of the parties involved (private autonomy). Prorogation is permitted only in the case of a choice of law, with the result that in the event of an exception under Article 21(2) of the EU Succession Regulation, the court of the last habitual residence does not have to pass the case on to any other court but instead has to apply the foreign law itself.[2]

With the ruling 'on the succession as a whole', Article 4 of the EU Succession Regulation underlines the principle of uniformity of succession.

According to Article 64, these mechanisms also apply to international jurisdiction for issuing the European Certificate of Succession, for which authorities can also be responsible, which, like the other questions of internal local, factual and functional jurisdictions, is a matter for the Member States (implementing laws).

In the case of a choice of law, jurisdiction in the Member State of the chosen law (and therefore convergence) depends on an agreement by the parties concerned (Article 5), a request of one of the parties to the proceedings (Article 6(a)), an express acceptance by the parties to the proceedings (Article 7(c)) or an appearance of other parties to the proceedings (Article 9). It can be uncertain and difficult to determine who counts as part of the group of people as a party to the proceedings (party involved).
For reasons of principle and expressly Article 62(3) and Recitals (29) and (36) of the EU Succession Regulation, the national procedures for the certificate of inheritance are to remain unaffected. Recital (29)(2) and (3) sets this out for out-of-court proceedings if the parties so wish. Article 8 of the EU Succession Regulation in conjunction with Recital (29)(1) makes the closure of proceedings which have been opened by a court of its own motion dependent upon an amicable settlement in the Member State of the chosen law. The intention of this provision is not immediately apparent, especially since the parties have only to submit the intention to reach a mutual agreement and not the agreement itself.

We shall have to wait and see how these rules are exercised in legal practice.

It would have helped make things simpler if the testator had also been granted the right, in addition to his choice of law, to bindingly allocate jurisdiction in the Member State (not third State) of the chosen law. Unfortunately the legislator did not take up this suggestion, for which convincing reasons are not apparent. In the event of any amendment this suggestion should be taken up.[3]

[1] See Janzen DNotZ 2012, pp. 484, 491, and Brussels I Regulation
[2] See also Bonomie in Bonomie/Wautelet, Article 21, marginal note 24
[3] See the European Parliament Study by Hess/Mariottini, December 2012

7. APPLICABLE LAW, HABITUAL RESIDENCE AND CHOICE OF LAW (ARTICLES 21 AND 22 OF THE EU SUCCESSION REGULATION)

The connecting factor with the last habitual residence or choice of law must be seen in combination. Until now, many Member States have only known nationality as the connecting factor; for the citizens of other Member States it was at least clear that with their property (often their principal asset) in their 'homeland' would be inherited in accordance with the succession law of their country of origin. As a result of the revolutionary change, citizens are now able to choose the law of their country of origin. It is not just about – laudable – party autonomy/liberality and legal security. Succession rules are a very sensitive matter which has developed through the generations and of which people are at least vaguely and subconsciously aware. The possibility of choosing the law had to take this into account, and it is the basis of the express option to make an implied choice of law without any increased burden of proof (Article 22(2) of the EU Succession Regulation).[1] The warranted correctness applies not only to courts, which is why they should as far as possible apply 'their law', but also to dispositions of property upon death, which should be interpreted according to the 'right law' as far as possible. For the same reasons, Article 83(4) of the EU Succession Regulation assumes the choice of law to be that of the testator's country of origin, so that in any event for dispositions before 17 August 2015 no 'knowledge of choice of law' can be claimed. This concept of the legislator must be taken into account when interpreting the provisions.[2] One connecting factor alone to nationality would have meant the application of foreign law across the board and would therefore only have been considered in combination with a choice of law in favour of the law of the country of residence. Such a solution would have been associated with considerable uncertainties (evidence problems) and above all would have made a solution impossible because of concerns about reserved shares/compulsory rights of inheritance[3], as is demonstrated by the fate of the Hague Convention of 1989.

The future will tell whether this concept can be expanded – carefully and within tight limits – by choosing the law of the place of habitual residence.

7.1.

Like other European Regulations (Brussels II, EU Maintenance Regulation, Rome I, Rome II, Rome III) and many other national laws, the Succession Regulation does not contain any definition of the habitual residence. A definition would not do justice to the diversity of situations or would be so general as to be of no use whatever. It is no wonder, therefore, that there is a lack of convincing formulations. The concept is expanded upon in Recitals (23) and (24). The chosen solution is flexible and adaptable. A waiting or minimum period does not contain any definition but leads as an additional criterion to further questions, investigations and time lost. The need for justice in each individual case in certain exceptional cases is taken into account by Article 21(2) of the EU Succession Regulation, though it does not create any jurisdiction. Furthermore, a true 'definition' would have affected the other European instruments in which this term is used; especially if we take 'habitual residence' to be a uniformly defined term.[4] Quite rightly it will be possible to describe a core term for habitual residence for all legal instruments, but in the conceptual surroundings various fine adjustments are allowed depending on the special characteristics of the legal area in question. In borderline cases the determination of habitual residence in maintenance questions can be different to the applicable law of succession.

The habitual residence is to be understood as the centre of the testator's interests[5]. According to Recital (4), sentences 2 and 3, priority is to be given to the centre of family and social life over professional/economic life.

[1] With reservations about this Lagarde op. cit. No 31; see Lechner in Dutta/Herrler DnotI, marginal notes 40/41

[2] For criticism of the concept, see Lorenz in Dutta/Herrler DnotI, marginal note 15 with citations

[3] Lagarde op. cit., 'protéger les héritiers réservataires'

[4] See Solomon in Dutta/Herrler marginal notes 33–38. Thorn in Palandt, EU Succession Regulation, Article 21, marginal note 5; discussion on Solomon et al. in Dutta/Herrler DnotI, p. 71; Wagner in DNotZ 2010, pp. 506, 514

[5] See reasons in Commission's proposal No 4.3.

On some issues[1] it has been found that habitual residence is not the same as place of residence and no legal intent is required for creating it, although subjective elements can be taken into account.[2]

In the case of those who are legally incapable, it will depend on the age and the extent of the disability of the persons in question.

A desire by the person concerned to remain permanently at the place of residence, and to some extent to no longer wish to return, is not necessary. The requirements for habitual residence are different to those for domicile under Anglo-Saxon legal systems.

7.2.

On some aspects of the choice of law:

According to Article 22(1) of the EU Succession Regulation the testator must hold the nationality of the State whose law he has chosen, either at the time of the choice of law or at the time of his death; if he holds more than one nationality, he can choose one of them; thus the choice of law, within the meaning of private autonomy and legal clarity, is not limited to the 'effective nationality'. To be valid, if is enough if the testator holds the nationality in question at the time of his death, which brings with it among other things a considerable easing in the succession proceedings because generally speaking no evidence of the earlier situation will be required. It is necessary for the State whose law is chosen to be specifically named.[3] However, it should also be sufficient if the chosen law is seriously and undoubtedly apparent from interpreting the statement.

As regards the implied choice of law, note that unlike Rome I Article 3 and Rome II Article 14, Article 7 of the EU Maintenance Regulation deliberately avoids the use of terms such as 'clearly' or 'with sufficient certainty'. In contentious proceedings these terms may have a purpose for allocating the burden of proof (?). When interpreting a last will and testament, the court will establish whether or not a choice of law is apparent from the dispositions. The meaning of 'clearly' would be uncertain in this context and would suggest that the barrier should be referred to a higher authority for approval of a choice of law. Other questions such as on the acceptance of a will to shape things/awareness of choice of law under conflict-of-laws regimes are to be developed in isolation from the Regulation, under European law and answered taking into account the specific assessments of the EU Succession Regulation.[4]

The choice of law can be made in isolation, i.e. without any connection with a testamentary disposition. Whether it is itself to be seen dogmatically as a testamentary disposition is not known. [5]

It is also possible to choose the law of a third State (Article 22 of the EU Succession Regulation).

The choice of law is valid even if the chosen law does not provide for such a choice of law (Recital 40), as under the legal systems of the majority of Member States. Article 22(3) of the EU Succession Regulation refers to the property provisions of the chosen law, which are key to the question of whether the choice of law has been made effectively, whether it can be bindingly implemented in the case of e.g. agreements as to succession, how consent is dealt with etc. (Article 26 of the EU Succession Regulation). To what extent stateless persons, asylum seekers and refugees have a choice of law is hard to answer. At least in those cases in which State treaties exist, it should be possible to make a choice of law via Article 75 of the EU Succession Regulation in conjunction with Article 12 of the Geneva Convention on the Status of Refugees or (in the case of stateless persons) Article 12 of the Convention on the Status of Stateless Persons of 28 September 1954. [6]

[1] See on this Solomon op. cit., marginal notes 7 et seq.
[2] CJEU of 22 December 2010 C-497-10, see also Döbereiner, Odersky, Solomon op. cit.
[3] According to Odersky Notar 2013, pp. 7 et seq.; Janzen DNOtZ 2012, p. 484
[4] See Ferrari in Ferrari/inter alia, Int. Vertragsr., 2nd edition Article 3 Rome I Regulation, recital 1(2) with citations, recitals 26 et seq.; Andrae in Rauscher (2010) Article 7 Maintenance Regulation recital 6
[5] See Dutta in FamRZ, 2013, pp. 3, 8
[6] See on this Salomon op. cit., marginal note 53, Döbereiner MitBNot 2013, pp. 362 et seq.; Thorn in Palandt EU-ErbVO Article 22 marginal note 4; Leitzen ZEV, 2013, p. 128

It should be pointed out as a precaution that the choice of law under Article 22 affects the rules of succession and is not to be confused with the possibility of choosing the law of the place where the disposition is made, although it can include it.

7.3.

The choice of law is only available in favour of the right of nationality in order to guarantee minimum protection of reserved shares/compulsory rights of inheritance and to avoid evasion and abuse. It is therefore used for legal security. This restriction is unsatisfactory in cases where citizens have been living in a Member State for decades and are integrated there socially and legally yet do not want to give up their original nationality. If such a citizen (a national of a Member State or third State) organises his estate based on the rules succession, as chosen by him, of his habitual residence or relies on transfer under the laws thereof, the danger arises that upon changing his habitual residence and the associated change of succession law, doubt would be cast on the dispositions of property upon death, while not in terms of their effectiveness, at least in terms of their effect and/or a totally different transfer would take place than the citizen had originally imagined. The criticisms are justified. A choice of law, even in favour of the place of habitual residence, could give rise to justified concerns about reserved shares and possible abuse if it is only allowed cautiously and within strict limits, e.g. only after a very long period of habitual residence. In the case of spouses in binational marriages, a choice of law could be allowed reciprocally in favour of the law of the country of origin of the other spouse, as a result of which the spouses could better align their succession planning based on the same succession rules. The time was not yet right for this when the EU Succession Directive was adopted. Within the meaning of private autonomy, liberality and freedom of choice and testamentary freedom for citizens, these options for the choice of law should be placed back on the agenda in the medium term once people have become aware of the EU Succession Regulation.

8. ADMISSIBILITY, SUBSTANTIVE VALIDITY AND FORMAL VALIDITY OF DISPOSITIONS OF PROPERTY UPON DEATH INCLUDING THE BINDING EFFECT OF AGREEMENTS AS TO SUCCESSION (ARTICLES 24 TO 27 OF THE EU SUCCESSION REGULATION)

8.1.

Articles 24, 25 and 26 of the EU Succession Regulation govern the admissibility and substantive validity – and in the case of agreements as to succession, also the binding effect – of dispositions of property upon death. Admissibility relates to the question of whether such a disposition is generally possible or prohibited and whether it is even allowed, e.g. what group of people are permitted to make certain dispositions of property upon death. As such questions could also come under formal validity, the distinction is fluid. For the purpose of uniform interpretation Article 26 (Recital No 48) lists by way of example some but not all the elements pertaining to substantive validity (see also Article 1(2)(b) of the EU Succession Regulation '… notwithstanding …'). Formal validity – including for agreements as to succession – is ensured by means of Article 27 of the EU Succession Regulation and possibly the Hague Convention (not for verbal dispositions of property).

Admissibility and substantive validity are based on the rules under which the disposition was made, a succession rule hypothetically related to the time when the disposition of property was created. The reason for this special linking of admissibility and substantive validity to their own rules under which the disposition was made is the inconstancy of the succession law caused by changing the habitual residence. Once a disposition of property upon death has been effectively created, it should not become invalid because of a change of status (preservation of the status quo). In the case of a disposition without any choice of law, this means that for admissibility and substantive validity, in accordance with Article 21(1) and – indeed also – 21(2) of the EU Succession Regulation, the succession law chosen at the time of making the disposition applies. For reasons of legal security, the rules under which the disposition was made remain unchanged. Lack of validity is not made good by a change of habitual residence, which can be different in the case of formal validity (see Article 27

(1)(b), (c), (d) ' … at the time of death ….' of the EU Succession Regulation). The succession rules (the succession law applicable upon the death of the person in question) remain unrestrictedly the succession law in accordance with Articles 21 and 22 of the EU Succession Regulation, i.e. in particular the reserved shares and compulsory rights of inheritance specified in this succession law. If in a disposition of property upon death legal concepts were chosen (e.g. waiver of succession, pre- and post-succession etc.), which are not known in the succession rules or have even been rejected by them, these legal concepts could still be provided by invoking the substantive validity of the disposition by means of the preservation of the status quo under the rules under which the disposition was made, especially since Article 26(1)(d) of the EU Succession Regulation links to these hypothetical succession rules for the interpretation of the disposition.[1] By making a choice of law under Article 22, if it fits a specific factual situation this uncertainty can be avoided.

Article 24(2) of the EU Succession Regulation allows a choice of law which can be exercised in isolation for admissibility and substantive validity only. This is subject to the conditions of Article 22, but must be strictly differentiated from a choice of law under Article 22, so that a choice of law can apply to the rules under which the disposition was made and the law of habitual residence can apply to the succession rules and vice versa. Thus a Dutch national with his habitual residence in Italy could choose Dutch law for the admissibility and substantive validity of his disposition of property, but could otherwise base his disposition on the Italian rules of succession because he wishes to remain in Italy; or conversely he takes account as the rules under which the disposition was made of the regulations at his habitual residence (Italy), but chooses Dutch law expressly limited to the succession law in accordance with Article 22 of the EU Succession Regulation. Such variations can arise e.g. because of different minimum age regulations when issuing a disposition of property upon death.[2]

It is obvious that these rules, made in the interests of private autonomy and testamentary freedom, can lead to difficulties of interpretation and errors. If in doubt, an equally non-specific choice of law will be taken as a fully comprehensive choice of law under Article 22 and Article 24(2).

Under Article 24(2) of the EU Succession Regulation, however, the right to some nationality stated in the future at the time of death cannot be chosen as it can under Article 22(2). The rules under which the disposition was made cannot be changed so the time at which the choice of law is made is key. The same applies in the case of Article 25(3) of the EU Succession Regulation. The purpose of the rules under which the disposition was made is to provide clarity and legal security for admissibility and substantive validity. This would be thwarted. With regard to the rules of succession, however, Article 22(2) of the EU Succession Regulation still applies.

8.2.

The above comments apply accordingly, but with further questions for agreements as to succession in accordance with Article 25 of the EU Succession Regulation.

A ruling on the handling of agreements as to succession and joint wills within the scope of the EU Succession Regulation was essential and difficult. In the majority of Member States they are either not permitted at all or only in exceptional cases. [3] In certain Member States they were even refused on the alleged grounds of ordre public, which has now been dismissed with the validity of the EU Succession Regulation but which remains in issue with regard to third States. One of the issues which is disputed is whether joint wills, and in particular those with reciprocal dispositions of property under German law (section 2270 BGB), are included within the concept of an agreement as to succession and thus in Article 25 of the EU Succession Regulation. [4] The interpretation must be carried out in isolation from the Regulation and assess the spirit and intention of the rule and the interaction of the provisions. Article 3(1)(d) of the EU Succession Regulation defines the disposition of property upon death. 'Agreement as to succession' is defined in (b) as a subdivision of the disposition of property upon death, and joint will is defined in (c). The wording regarding the agreement as to succession is

[1] See Bonomi in Bonomi/Wautelet, Article 24, marginal note 7 and Bonomi/Öztürk in Dutta/Herrler DNotI 2013, marginal notes 44 et seq., otherwise Döbereiner MittBayNot 2013, 35, 356

[2] Doubting Leitzen in ZEV 2013, p. 128, agreeing Odersky in notar 2013, 3,6, as well as the clear wording.

[3] See on this the presentations in Süß Erbrecht in Europa 2002 country reports

[4] See Nordmeier ZEV 2012, p. 513, 2013, pp. 117 et seq. Buschbaum/Simon NJW 2012, p. 2396, whose opinion is, however, only to be understood as a precaution within the meaning of 'choosing the safe path'.

deliberately left wide open. In essence it states: 'for the purposes of this Regulation agreement as to succession means an agreement, which creates, modifies or terminates …'. This also includes e.g. agreements for the relinquishment of inheritance and the relinquishment of reserved shares or agreements such as relinquishment of an action in abatement by the mandatory heirs, testamentary agreements under common law and possibly also donations upon death and agreements in favour of third parties upon death. [1] Using the words 'agreement as to succession' in the German translation will bring to mind the widely used agreement to succession in the proper meaning of the word and adversely affect the understanding of the concept. Articles 24(1) and 25(1) of the EU Succession Regulation differ in principle only by the addition of 'binding effects' i.e. the key for the definition of 'agreement' is apparently the binding effect. All agreements with binding effect should be covered by Article 25, all the sections of which are tailored to this. The solution lies in the validity of the rules under which the disposition was made for admissibility, validity (in this respect identical to Article 24) and binding effect, while otherwise Articles 21 and 22 of the EU Succession Regulation on the succession rules to be chosen, together with its reserved shares and compulsory rights of inheritance, continue to apply upon death. If this solution for agreements as to succession applies in the narrower sense, there is no need to proceed otherwise in the case of 'agreements with binding effect' in joint wills. Otherwise it could have been in doubt whether agreements with binding effects could also arise from individual wills, which is why this was clarified in (b). If such agreements arising out of individual wills fall within the definition of an agreement as to succession, it would be hard to justify the exclusion of such agreements – contained in joint wills – in a joint document. If in Article 3(1)(c) of the EU Succession Regulation joint wills are defined as a subcategory of the disposition of property upon death, this is for the purpose of consistency between Article 27 of the EU Succession Regulation and the Hague Convention, which, according to Article 75 of the EU Succession Regulation, continues to apply in the case of those Member States which are parties to the said Convention. Other Member States and, as regards agreements as to succession (these are not covered by the said Convention), all Member States, are subject to Article 27 of the EU Succession Regulation, which for its part corresponds to the Hague Convention, with the result that fortunately these provisions now apply in all Member States. One might consider the chosen legal technique in Article 3 of the EU Succession Regulation – and also as regards the list of b, c and d – to have been unsuccessful; this does not justify the conclusion, however, and is materially not compulsory; because of the formation of its own (c) for joint wills these are excluded as a subcategory of the term 'agreement as to succession'. It can be concluded from the spirit and intention of the ruling and also from reaching a plausible result, as well as from the interplay of the wording, that with the application of Article 25 all agreements are to be regarded as 'agreements as to succession' with – even if only minor – binding effects, whether in the form of agreements as to succession in the strict sense, joint wills or mutual individual wills. This may bring with it difficulties in the dogma of the legal systems of Member States, but these are not crucial for the interpretation and application of the EU Succession Regulation. [2]

As for admissibility, substantive validity and – in addition – binding effect, the above comments regarding Article 24 of the EU Succession Regulation apply analogously. The variations in Article 25(2) and 25(3) of the EU Succession Regulation still only affect the rules under which the disposition was made, and not the rules of succession. Thus if a French citizen with his habitual residence in Germany makes an agreement as to succession which relates solely to his estate, but later dies with his habitual residence in France (or Italy, or Spain or …), the agreement as to succession remains admissible, valid and binding, but the reserved shares arising out of the applicable – French – succession law (substantive succession rules) apply.

According to Article 25(2) of the EU Succession Regulation, an agreement as to succession, which affects the estate of several people, is permissible in the person of any one testator, and the substantive validity and binding effect are nevertheless subject to the law to which the closest link exists. This has the advantage that for this important question in particular, the binding effect only has to be linked to one legal system. The parties involved cannot specify this 'closest link' but they can – and should – document the factual circumstances which give rise to this closest link. Documentation is also advisable with regard to the habitual residence if this

[1] Dutta in FamRZ, 2013, pp. 4, 5, Odersky notar 2013, pp. 3, 121, Odersky in Süß, 2nd edition, country report on England and Wales, marginal note 84

[2] Bonomi in Dutta/Herrler DNotI 2013, marginal notes 88–94 with citations Lechner in NJW 2013, pp. 26, 27 Herzog ErbR 2013, pp. 8, 9, Dutta in FamRZ, 2013, pp. 4, 10, see too Hlbig-Lugani IPLax 2014, pp. 480 et seq.

is significant in terms of the rules under which the disposition was made or succession rules – but again is not binding for a court. The above validity of the succession rules as independent of the rules under which the disposition was made also applies in the case of agreements as to succession with more than one person whose estates are affected (usual case) for each of these persons individually. Thus, for example, if a German/Italian couple whose joint habitual residence is in Germany entered into an agreement as to succession under German law, this is admissible, effective and binding; if, however, the spouses or one of them dies with his/her last habitual residence in Italy, the Italian reserved shares/compulsory rights of inheritance apply. By making a choice of law under Article 22, the German partner could have chosen German law as the succession rules for himself, possibly with a corresponding interpretation (implied choice of law), while the Italian rules of succession would still apply to the Italian partner.

Article 25(3) of the EU Succession Regulation allows a choice of law according to Article 24(2) for the rules under which the agreement as to succession was made. Once again the law of a future nationality cannot be chosen. For this choice of law it is sufficient even if this option to choose is open only to one of the persons whose estate is affected, i.e. if he holds the nationality in question. An Austrian/Italian couple with their habitual residence in France could therefore make an agreement as to succession and choose Austrian law for the admissibility, validity and binding effects of such an agreement. An Austrian spouse could in addition choose Austrian law for his rules of succession but is not obliged to do so.

Here too it is the case that an agreement as to succession which was invalid when it was set up is not mended if the requirement for its validity subsequently exists.

The risk of errors and problems of interpretation in the case of a choice of law under Article 25(3) of the EU Succession Regulation is great. A layman will hardly ever accurately comprehend the necessary differences between the choice of rules under which the disposition was made and/or the rules of succession where several testators are involved. Detailed advice and accurate wordings are vital and are in any event advisable in the case of successions with a foreign element. The European Judicial Network in civil and commercial matters[1] and the inheritance portal of the Council of Notariats of the EU[2], in which the inheritance systems of all Member States are presented, are a valuable source of information and assistance in this respect.

What is open to question in this context is whether a choice of law can be made which is binding under an agreement as to succession, for which a requirement exists with regard to waivers of succession, waivers of reserved shares and entitlement to greater reserved shares. The conditions and time limits for the restoration of donations between legatees made inter vivos or for claims against the recipients of donations vary in the individual substantive succession rules of Member States. If a donation has been made in a Member State which, under the rules of succession of the Member State, cannot or can no longer be claimed, the legatees/recipients of the donation must still expect claims if the testator moves his habitual residence to another Member State whose rules of succession contain more extensive conditions or time limits.

As a general rule, waivers of inheritance, waivers of reserved shares and choices of law come under the concept of the agreement as to succession within the meaning of the EU Succession Regulation. Whether they are permitted, effective and binding is determined by the substantive rules of succession in question (rules of succession). In the German government's current draft of the law implementing the EU Succession Regulation, it is proposed that a choice of law can be agreed by means of an agreement as to succession, something which has not so far been expressly stated in the German Civil Code. By means of the binding choice of law, the relevant less far-reaching rules on reserved shares and additional reserved shares could become bindingly established.

[1] https://e-justice.europa.eu
[2] www.successions-europe.eu

9. RENVOI (ARTICLE 34)

According to Article 20, the EU Succession Regulation is universally applicable, i.e. even if the law of a third State were to apply. As a result, Article 34 of the EU Succession Regulation will apply only if the testator had his habitual residence in a third State and the succession property is in a Member State. The United Kingdom, Ireland and Denmark are to be treated as third States. Reference is made to the difference between habitual residence within the meaning of the EU Succession Regulation and domicile under Anglo-Saxon law. [1]If then a citizen of a Member State has his habitual residence within the meaning of the EU Succession Regulation, for example in England or even a US State, but from the point of view of that State still has his domicile in a Member State, then this renvoi will be accepted. If the testator has his habitual residence and domicile in one of the said States, but the latter's IPL makes a renvoi in respect of the property to the law of the place where it is stored, this renvoi will also be accepted if the property is in one of the Member States, which can lead to a fragmentation of succession.

The renvoi does not apply if the law of the third State applies because of a choice of law or pursuant to the exception provision in Article 21(2) of the EU Succession Regulation. Furthermore, this also applies in the cases not expressly specified in the wording of the law in Article 24(2) and Article 25(3) of the EU Succession Regulation.[2]

10. ORDRE PUBLIC (ARTICLE 35)

As is usual in the Union's IPL, as well as in Article 35, the EU Succession Regulation allows for refusal in the case of ordre public in other locations in the Regulations (Article 40 (a), Article 59(1), Article 60(3) and Article 61(3) of the EU Succession Regulation). Concerns about reserved shares/compulsory rights of inheritance have dogged the Regulation from the outset and, once the Regulation is passed, will also be discussed in the context of ordre public.

In its proposal in Article 27 the Commission had proposed a point (2) which was deleted during the debates, at the suggestion of the European Parliament among others and is no longer contained in the EU Succession Regulation. The only conclusion from this deletion is that the legislator wished to make it easier to invoke ordre public on the grounds of breach of reserved shares. This, however, is not correct. The Commission's proposal in Article 27(2) (COM 2009/0175) stated as follows: '„the application of a rule of the law determined by this Regulation may not be considered to be contrary to the public policy of the forum on the sole ground that its clauses regarding the reserved portion of an estate differ from those in force in the forum..' The intention of this paragraph – a certain squashing of ordre public in connection with reserved rights – was welcome. However, the wording was worse than unintelligible and could, on the contrary, give grounds for the interpretation that the secondary legislator considered an application of ordre public to be permitted and even advisable if the deviations were not only 'elsewhere'. This was not at all what was intended. In a study carried out for the European Parliament Committee on Legal Affairs, Professor Pataut[3] came to the conclusion that at least within the circle of Member States, ordre public on the grounds of damage to reserved shares/compulsory rights of inheritance could be all but excluded. The same applies with regard to discrimination, which can be excluded among the Member States because of the application of the Charter of Fundamental Rights, the European Convention on Human Rights and the principles of the Treaty of Lisbon (see also Recital 58). As a result of the convergence of the competent court and applicable law, the number of conceivable cases is further minimised. If, because of a choice of law, a court applies foreign law, it will not apply the ordre public in the case of the law of a Member State, so ultimately it is the law of the testator's country of origin that matters. If it is the law of a third State, in exceptional cases, e.g. deliberate avoidance by acquiring a foreign nationality or also a habitual

[1] See Lein in Duta/Herrler DNOtI 2013, marginal note 32.
[2] See Dutta in FamRZ, 2013, p. 12; Janzen DNotZ 2012, pp. 484, 490
[3] Pataut Study for the European Parliament, Nov. 2010

residence in a third State which is obviously only for the purpose of riding roughshod over reserved shares, application could be considered.[1]

The situation is different if the law of a third State applies (whether in connection with the habitual residence or a choice of law) and cases of discrimination exist, in particular on grounds of religion or sex. [2]

In these cases the ordre public is to be applied depending on the factual situation. Crucially, however, the ordre public of the Member State in question is included.

Successfully invoking the ordre public within the circle of the Member States would undermine the effet utile of the EU Succession Regulation, which brings with it legal security for citizens when planning their succession. It will therefore be possible to exclude the application of ordre public in the circle of Member States from all points of view.

11. ACCEPTANCE OF AUTHENTIC INSTRUMENTS (ARTICLE 59)

In rules of succession as in property law, authentic instruments such as wills, agreements as to succession and marriage contracts are of great importance. In the Commission's proposal in Article 34, it was therefore briefly and concisely stated that there should be reciprocal 'recognition' of authentic instruments in the Member States. 'Mutual recognition' is much loved at European level and no doubt appropriate for determining political objectives. Caution is advised when using it as a legal concept. There is no generally valid legal meaning of mutual recognition; instead it must always be worked out and specified within the particular context. The Commission's proposal was too general and left too much room for interpretations and misunderstandings. The Regulation now uses the – newly introduced – concept of 'Acceptance of authentic instruments' and limits cross-border acceptance to 'evidentiary effects'. This makes it clear that for the legal business set out in the instrument itself and its cross-border recognition, the conflict of laws is key and the key legal situation for the documented legal act (negotium) in the country in which the instrument was issued cannot be transported by means of an 'acceptance of authentic instruments'.[3] This is obviously also the point of view on which the Commission's proposal is based for a Regulation to free authentic instruments from legalisation and apostilles (already provided for in Article 74 for instruments within the scope of the EU Succession Regulation) (proposal of 24 April 2013, COM (2013)/228); as well as form II (attestation in respect of an authentic instrument in a succession matter) in the Regulation for the implementation of the EU Succession Regulation of 15 December 2013.

The extent of the evidentiary effect is initially limited by the corresponding provisions of the State of origin. It can be unclear whether these provisions themselves apply in the target State if they go beyond the effects of an 'evidentiary effect' applicable in the target State itself or are unknown.

With Article 59 of the EU Succession Regulation, rules are made for the first time in a European legal act about the validity of the evidentiary effects of authentic instruments, which can be described as a 'breakthrough' and, irrespective of certain boundary questions still to be clarified (see Recitals 61-66), is a positive and important step for the circulation of authentic instruments within the European legal area.

Article 59 applies only to instruments issued within the scope of the EU Succession Regulation (Article 1), i.e. in particular not to the personal status instruments so important for citizens in succession proceedings (Article 1(2)(a) of the EU Succession Regulation). It would be desirable if the aforesaid proposal by the Commission (COM (2013)/228) were adopted in the foreseeable future.

[1] See the case of Rauscher in Dutta/Herrler DNotI 2013, p. 129
[2] See Stürner in GPR 2014, pp. 317 et seq.; see Bonomi op. cit., Article 22, marginal notes 77–81
[3] See Geimer in Dutta/Herrler DNotI 2013, Lagard, op. cit., p. 732, Lechner in Dutta/Herrler, op. cit.

12. CHAPTER VI ARTICLES 62 TO 73, EUROPEAN CERTIFICATE OF SUCCESSION (ARTICLES 62 TO 73)

The creation of a European Certificate of Succession (ECS) is a European political innovation which, for most Member States at least, is new in this format. The political aim and European added value of the certificate lies in its use for citizens who should be able to use it to exercise their rights as heirs, legatees, executors of wills or administrators in cross-border cases in just one procedure, more simply, more quickly, more cheaply and more efficiently.

12.1.

The issuing of the ECS is not a legally enforceable decision but rather a certificate issued by a court or other authority in respect of the succession, with a presumption of accuracy – under substantive law – and the protection of good faith. The ECS is only to be issued upon application and only if it is needed for cross-border purposes (Article 62(1) of the EU Succession Regulation).

THE ECS is an optional Instrument whose use is not mandatory. It does not replace internal procedures (Article 62(2) and 62(3) of the EU Succession Regulation); the result of the baseline of the EU Succession Regulation, Member States' legal systems and procedures are to be left unchanged. The procedures used to date in the Member States as evidence of legitimation as heirs continue to apply without restriction alongside the ECS.

12.2.

The question of jurisdiction is to be separated from the existence of the ECS and the national certificates, which are clear from the wording of the EU Succession Regulation and its basic decisions.[1]

It is undisputed in this respect that procedures based outside the court organisation, e.g. in France (acte de notoriété), Italy (atto di notorietà) or Spain (acta de notariedad), can be claimed at any time and indeed are to be preferred according to Recitals (29) and (36). They are not bound by any jurisdiction rules in Chapter II of the EU Succession Regulation, with the substantive law effects, seen under European law, being confined to the Member State in question. Thus for example the heirs located in France of a French deceased who has made Cyprus his habitual residence but has left his assets in France and has died without a disposition of property upon death could settle the succession locally in France by means of an acte de notoriété, in which case Cypriot law would be applicable. At the same time they could apply for an ECS in Cyprus, which they might possibly need for assets of the deceased in another Member State or they can claim under the procedure of that Member State.

If certificates of inheritance are formally issued by 'courts', the binding nature of the jurisdiction regulations is doubtful. Recital (29) gives an indication in this respect, where the first sentence elaborates on whether the court is acting of its own motion. Only in this case do the parties involved have to have the inheritance settled out of court in the Member State of the chosen law; otherwise they have a free choice. In a summary of Article 3(1)(g), Article 4 and Articles 39 et seq. of the EU Succession Regulation (the latter are aimed at contentious proceedings), the conclusion will be reached by way of reduction that Chapter II of the EU Succession Regulation applies only to inheritance certificate proceedings in court if its decisions acquire legal enforceability. The validity of the jurisdiction in Chapter II, though there only Articles 4, 7, 10 and 11 for the issuing of the ECS (Article 64), lies in the fact that the ECS has binding cross-border effects and for this reason jurisdiction cannot be left to the freedom of choice of those involved. A certificate of inheritance, however, which is issued only upon application and not of its own motion, which is not capable of legal force and can be withdrawn at any time, which has only a legitimation effect, which is connected to the certificate, not to the decision, does not claim any cross-border effect either and is not to be classified as a 'decision' within the meaning of Chapter II, so the jurisdiction rules in Chapter II do not apply. It is the intention of the EU Succession Regulation that citizens should have freedom in succession matters to choose the way which seems to them the

[1] See on Komplex Kleinschmidt in RabelsZ 2013, pp. 23 et seq.; Omlor in GPR 2014, pp. 217 et seq., Süß ZEup 2013, pp. 725 et seq. Dutta in FamRZ, 2013, pp. 4 et seq., R. Wagner in DNotZ 2010/506 et seq., Buschbaum/Simon ZEV 2012, pp. 525 et seq., Lechner ZErb, pp. 191, 192

most suitable. Whether or not internal procedures are covered by the EU Succession Regulation, and in particular Article 59 and still less Articles 39 et seq., which are apparently aimed at a contentious procedure, is left open.

12.3.

According to Article 69 of the EU Succession Regulation, the protection of good faith is not provided if the person in question was unaware, as a result of gross negligence, that the content of the certificate was incorrect. This restriction on the protection of good faith as opposed to Article 42 of the Commission's proposal can result in scepticism in dealings regarding the ECS.

What is not conclusively clarified is the function of the attached copy of the ECS in connection with the protection of good faith. Is simply issuing the ECS or possibly issuing the accompanying copy enough for its protection or must the certified copy have been submitted to the third party when the legal transaction was agreed or is it enough if he was aware of the certified copy and its content? The provisions of the EU Succession Regulation are unclear.

Articles 69(3) and 69(4), which are intended to protect third parties, use a neutral wording '…person mentioned in the Certificate as authorised to accept payment or property', while the Commission's proposal (Articles 42(3) and 42(4) still stated '… acquired … from the bearer of a certificate'. On the other hand, it is apparent from the extensive provisions regarding the certified copy that significant importance is attributed to this. The penultimate sentence of Recital (71) states that protection will be ensured 'if certified copies which are still valid are presented'. The period of validity of a certified copy is limited. Revocation of the certificate must be notified without delay by the issuing authority under Article 71(3) and Article 73(2) of the EU Succession Regulation to all persons to whom certified copies have been issued. However, there is no provision for the mandatory collection of the certified copy, presumably because of concerns about the possible liability of Member States. From the context of these provisions it can be concluded that the good faith effect of the ECS does not exist in abstraction, but is provided only by means of the certified copy. On the other hand, it is going too far to demand the submission of the certified copy upon the conclusion of the legal transaction, rather it should be sufficient for the third party to be aware of the certified copy and its content, e.g. by submitting a copy.

These questions are open and may also have to be clarified in legal practice in connection with greater specification of the point from which gross negligence exists.

Furthermore, it should be noted that the assumption of correctness and protection of good faith are covered in the ECS and not whether individual components of the assets form part of the succession, even if they are listed in the ECS.

12.4.

It cannot be ruled out that there might be more than one ECS with contradictory content and more than one certified copies and possibly also national certificates of inheritance and/or extrajudicial agreements.

Whether in such cases good faith as a whole disappears or whether it continues to exist and depends in the case of a legal transaction on the time sequence or how else to proceed, cannot be definitively answered. If the protection of good faith breaks down, the usability of the ECS in legal transactions could be damaged. The starting point is the good faith of the third party (gross negligence). If this existed, he should be permitted to rely on the correctness, and the protection of good faith will not be taken away from him.

In other respects claims for compensation, claims for possession or even claims arising out of unfair enrichment are based on the substantive law of the Member States and are not within the scope of application of the EU Succession Regulation.

12.5.

Denying the protection of good faith in the case of gross negligence can be entirely comprehensible and justified from the point of view of the rightful beneficiary, who otherwise loses his property. On the other hand, there is no denying that the inherent uncertainty coupled with the lack of clarity could have an adverse effect

on the usability, acceptance and efficiency of the ECS in legal transactions. The expectation is that case law will resolve the outstanding questions in a plausible and workable manner.

12.6.

The European Certificate of Succession is intended above all for the benefit of citizens, to make it easier to settle a cross-border succession. In practice, the procedures required for it – submission of application, issuance and use of ECS – are of great importance. There is no doubt that the use of standard forms in cross-border transactions is advantageous. Article 38 of the Commission's proposal still stated that the application should also be bindingly made by means of a form. In the legislative procedures this was changed, as was the information about mandatory content, in the interests of making it easier to manage and understand. According to Article 65(2) of the EU Succession Regulation, the application can – not must – be submitted by means of a form and in Article 65(3) 'to the extent … necessary' is added regarding the content of the application. For the issuing of the ECS the mandatory form has been retained because of its use across Europe, but in Article 68 'to the extent required' is added regarding the information to be provided, for the purposes of simplification. The legislator here had his eye on an excess of forms and an associated overstretching not only of the citizen and legal transactions but also, in some cases, of the authorities.

12.7.

The eagerly awaited forms are now available – ABL (EU) No L 359 of 15 December 2014. The implementing Regulation has been adopted by the Commission in accordance with Articles 80 and 81 of the EU Succession Regulation in the advisory procedure (Article 4 of Regulation (EU) No 182/2011), in which it had to take into account the opinions given by the committee.

Nor have the concerns about being overloaded by the two forms – which come to some 40 sides between them– gone away. One reason for the multitude of points and subpoints listed is thought to be that someone in one of the Member States should only take account of conceivable facts and force the representatives of the Member States to do this without taking the overall effect into account.

If the aim is to have processing in digital form, it must be pointed out that the application can be submitted only in writing and must contain only the information which is necessary in the specific case for the Certificate to be issued. Doubts have been raised as to whether the ECS is the right approach to promote digitalisation in legal matters.

12.8.

Reference is made to certain points. In the application form a range of information is described as obligatory which, at least according to Article 65 of the EU Succession Regulation, does not have to be obligatory, because under certain circumstances it 'is not required'. It is not immediately obvious why information on the applicant's family status should be necessary. The question in 6.6 as to whether the testator was, along with others, the joint owner of property appears irksome. There may be Member States in which this is of importance because of a special condition (e.g. Austria) but presumably for the majority it is insignificant, but conversely for the heirs it is very time-consuming.

On the other hand, it is surprising that no information is requested about the important, even central, question of where the testator had his last habitual residence. Just the 'address' is asked for. The heir may not be able to assess or even be aware of the legal concept of 'habitual residence'. However, the issuing authority must obtain a picture of the actual circumstances in order to ascertain the habitual residence. This information is not provided by the last address. It would have been advisable to put it to the applicant – although not compulsorily – to provide more details on the actual life circumstances of the deceased and where in the applicant's opinion the focus of the deceased's life was.

It will be possible to assume that an application is being made properly only with the involvement of an advisor. Therefore in the event of the form being revised, it would be worth considering a different approach, namely asking only for the most necessary information – possibly also in digital form –and in addition adding a handout

in which reference is made to the many variations and, if necessary and possible, further information is requested.

12.9.

In the case of the ECS itself, the situation is somewhat different as it is used in legal transactions across Europe and should therefore be standardised. Nevertheless it is also true of the ECS itself that it contains many points which are not required in individual cases. During processing and issue (and in any event in the case of digitalisation) each of these points must be checked and potentially excluded, which adversely affects the clarity of the ECS and its comprehensibility for any third party. In Annex III to the ECS form, information is correctly specified regarding the marital property system. No indication is given as to which matrimonial property law is used to determine the property system. The property system is important in Annex IV to the ECS form – the shares of the inheritance have to be stated. The connections between property law and succession law can, as described in Chapter 4, give rise to uncertainties; under certain circumstances an inheritance share would have to be shown separately (e.g. under section 1371(1) BGB). This is not addressed.

Under Point 10 of this Annex IV the terms and restrictions of the inheritance have to be given, similarly to the scope of the authority of executors of the will or administrators in Annex VI. In any event under the provisions of German succession law this will in many cases simply not be possible, not least because it is dependent on the content of the relevant disposition of property upon death.

The legitimation effect and the protection of good faith do not or wrongly refer to stated restrictions and authorisations. The information on this point must therefore be carefully thought out and potentially answered as a whole.

12.10.

The issuing of forms is a difficult task with 25 Member States involved, particularly since as each has different peculiarities; proposed digitalisation is another factor. It is no wonder, therefore, that the forms are weighed down with every conceivable type of problem. There will be reason to doubt whether acceptance of the ECS is helpful. Another approach would be to limit it to the most necessary of the mandatory information, and otherwise leave it to the applicants and subsequently also the issuing authorities, to make the necessary additions. In the majority of cases this would also meet the practical requirements. If a testator with his habitual residence and most of his assets in one Member State additionally also has a property in another Member State, the heirs will under certain circumstances only claim under the two national inheritance certificate procedures; and in the case of the authorities something comparable (reference to an alternative procedure) is not to be dismissed.

The European Certificate of Succession is a completely new creation and will prove itself in legal practice, possibly after some clarification. As for the procedures and forms, we shall have to wait for the first practical experience. The legislator deliberately worded the provisions of the Regulation (Articles 65 and 68 of the EU Succession Regulation) openly and transferred the precise structure to the committee procedure, so that a revision is possible at any time without the time and expense of a legislative procedure.

13. INTERNATIONAL CONVENTIONS (ARTICLE 75)

The Regulation does not affect the application of international conventions in matters covered by the Regulation provided at the time of acceptance of the Regulation Member States are party to such conventions, as is already clear from Article 351 of the TFEU. This priority of conventions which for their part are to be interpreted in isolation from the agreement conceals a significant potential for conflict. Only a few lines of conflict can be listed. The continued application of the Hague Convention does not pose any problems as Article 27 of the EU Succession Regulation ensures wide-ranging agreement with the rules of the EU Succession Regulation. What are important are conventions with conflict-of-laws regimes on the applicable law. In the case of Germany, for example, three such conventions are applicable, namely with Turkey, Iran and the states of the former USSR, obviously excluding those which have since become Member States of the EU. Whether the scope of application of a convention has been opened in relation to the EU Succession Regulation in terms of persons, space and property (in terms of time from 17 August 2015) can be open to doubt. As regards the personal applicability, it is questionable how refugees, asylum seekers and persons of dual nationality are to be treated. Some of the problems are to be demonstrated soon on the most important convention for Germany, the German–Turkish consular agreement of 28 May 1929, which contains a succession agreement.[1] Under this agreement, movable property is transmitted to the testator's country of origin and immovable property is transmitted in accordance of the law at the place where it is located; furthermore, the agreement contains rules about international jurisdiction and the reciprocal recognition of decisions and orders that the rules regarding connecting factors apply even when the testator 'has died' outside the State which is party to the agreement. If a Turkish citizen dies with his habitual residence in Germany and only has assets in Germany, the outcome is clear. The succession agreement applies and not the EU Succession Regulation. If, however, the testator has assets, e.g. property, in another Member State, the conclusion is obviously that the succession agreement does not apply to the property (spatial-territorial limit); instead the EU Succession Regulation applies and German courts/authorities are responsible for issuing an ECS under the EU Succession Regulation, limited to assets located outside Germany. Irrespective of this, the heirs could use the normal national procedures in the Member State in question. What is the situation if a Turkish citizen has his habitual residence in a Member State outside Germany but has assets, and in particular property, in Germany? The courts/authorities of the Member States in question apply just the EU Succession Regulation and issue an ECS with unlimited validity, which contradicts the succession agreement under which German law should apply. It remains unclear how a German authority, e.g. the land registry, proceeds with the ECS and whether it can knowingly breach the state treaty, the content of which currently definitely states that it should be interpreted to the effect that it is also applicable to such cases; an interpretation which could be corrected under the amended conflict-of-laws provisions for Germany, in light of the EU Succession Regulation. The protection of good faith of the ECS in legal transactions (no state authority) must be held to be established.

The interpretations of the conventions to date are understood against the background of the relevant conflict-of-laws system of the Member State in question. With the validity of the EU Succession Regulation, this changes and the interpretation of the convention cannot be considered without taking account of the EU Succession Regulation and the obligations of the Member States/treaty states arising therefrom under European law (Article 351(2) of the TFEU). In this respect they are also open to judicial review by the CJEU, which otherwise has no jurisdiction for interpreting state treaties.

These and other questions cannot be answered definitively. In any event the obligations of Member States must be assessed restrictively under international law with the aim of restricting the application of the convention to the territory of the treaty state/Member State in terms of people and territory.

The best solution would obviously be to renegotiate/terminate the convention, as suggested by the Max Planck Institute in its opinion on the Commission's proposal.[2] Associated conflicts and decision processes in the

[1] Regarding the Consular Agreement, see Dörner in Staudinger (2007) Vorb. Re Article 25 f EGBGB, recitals 160–192; see Süs in Dutta/Herrler NOtI

[2] Rabels Z. 2010, pp. 532 et seq. and p. 710

Member States would have weighed so heavily on the advice regarding the EU Succession Regulation that its conclusion would have been deferred indefinitely.

That leaves a termination and renegotiation of the – now outdated – convention, which could also be in the interests of the third States in question. When the EU Succession Regulation comes into force, the external power in its area is transferred to European level according to the CJEU's AETR case law[1], which would have jurisdiction for terminations and potentially renegotiations. For the case of a simple termination, this appears doubtful because by doing so the Member State would only comply with its obligations under Article 351 of the EU Succession Regulation and no adverse effect on the EU Succession Regulation is foreseeable. Nevertheless it is both factually and politically justified to undertake a joint procedure at European level in conjunction with the Member States affected.

Speedy initiatives by the Commission and Member States would be extremely desirable.

14. ARTICLE 83 – TRANSITIONAL PROVISIONS

The transitional provisions have been substantially amended in the legislative process compared to Article 50 in the European Commission's proposal. Under this a large number of the choices of law made in the past (e.g. under Dutch law and under German law) would have become invalid and testamentary dispositions were at risk because of a change in the inheritance law. The latter is now largely excluded by means of Article 83(3) of the EU Succession Regulation.

Article 83 of the EU Succession Regulation is governed by the principle of favor testamenti. Protecting the trust of citizens in the continued validity of their dispositions upon death and of choices of law is a major concern of the provisions of this article, which are therefore to be interpreted broadly. [2] According to Article 83(2), all choices of law are valid which meet the requirements of Chapter III of the Regulation. It is clearly stated that this applies to all choices of law made before 17 August 2015. The retroactive validation also brings problems, but these are to be accepted within the meaning of favor testamenti. No restrictions are to be made and are contrary to the clear wording.

Retroactive cures also arise on matters of admissibility, substantive validity (in the case of agreements as to succession on the binding effect also) and formal validity because the provisions on the rules under which the disposition is made in Articles 24 and 25 in conjunction with Article 26 of the EU Succession Regulation are to be applied retroactively, as with Article 27. Conversely no cure is introduced by the inheritance law. If an Italian couple with their habitual residence in Germany made an agreement as to succession under German law before application of the EU Succession Regulation, this is to be seen as valid from 17 August 2015 because of the rules under which the disposition is made (Article 25 of the EU Succession Regulation) applicable at that time. If, however, the couple had entered into this agreement as to succession and their habitual residence was in Italy, it would be invalid and would then be cured if they died with their habitual residence in Germany and German inheritance law therefore applied. Choices of law which do not meet the criteria of Chapter III remain valid if they are/were valid under the IPL of the State of habitual residence or the law of the testator's country of origin (Article 83(2)). If it depends on the legal system (IPL) of the country of origin and the latter's conflict-of laws regime directly allows the said choice of law, the result is clear, the choice of law remains valid. However, in the Anglo-Saxon field in particular and in French law – to date – for property ownership, the renvoi is to the place where the property is located. If a renvoi of this kind is to a substantive law, recognition of the choice of law is removed. In the States mentioned, however, this lex re sitae applies as an overall renvoi, i.e. the renvoi is made to the law of the State where the property is located, including its conflict-of-laws regime. If for its part this conflict-of-laws regime allows the choice of law, then the choice of law should remain valid. To date, a partial choice of law under Article 25(2) EGBGB, whereby German law could be chosen for a property located in Germany, was recognised by France; and this was irrespective of where the French citizen had his habitual

[1] Ruling of 31 March 1971 – 22-70, CJEU Opinion of 7 February 2006 (Lugano) 1-03; see also Regulations 662/2009 and 664/2009
[2] Schoppe IPLax 2014, pp. 27 et seq.

residence and even when the succession procedure in France was handled under French law.[1] The French citizen with his habitual residence in France could therefore, if he chose German law as the law applicable to German property, rely on the fact that this would also succeed and exist in France.

Favor testamenti and protection of the trust of a citizen in the validity of his dispositions related to the time when he made the said dispositions are grounds for a broad interpretation of Article 83(2) of the EU Succession Regulation.[2] Article 83(2) of the EU Succession Regulation does not specify that the law of nationality must permit the choice of law but instead states 'were in force … in any of the States whose nationality he possessed'. In the case described above the choice of law was valid in this sense at the time it was made, which is why such choices of law in the cases described, which also arise under English law or the law of the United States, are to be seen as valid.

[1] See Döbereiner in Süß 2nd edition country report on France recital 16

[2] See Lechner in ZERB 2014, pp. 191, 192, Döbereiner in MittBayNot 2013, p. 445

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Session I - Less paper work for mobile citizens

Regulation (EU) 650/2012/EU 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

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The Regulation (EU) 650/2012/EU of 4 July 2012 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 establishes common private international law rules for the Member States for determining the jurisdiction and applicable law in succession matters. It creates the European Certificate of Succession, which could be used by beneficiaries of a deceased for demonstrating their legitimate rights.

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LIST OF ABBREVIATIONS

Succession Regulation or The Regulation	Regulation 650/2012/EU of the EP and the Council of 4 July 2012 [1]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
The Convention	The Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions

[1] OJ L 201, p. 107 -134

EXECUTIVE SUMMARY

Background

Regulation 650/2012/EU 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 (here and after referred to as *Succession Regulation* or *regulation*) entered into force on the 16th of August 2012 but will be fully applied from the 17th of August 2015.[1]

The scope of the Succession Regulation is to include all civil-law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession.[2]

The Succession Regulation is applied only to the succession of the estate of the deceased persons who will have passed away after the 17th of August 2015.[3] It does not govern matters related to revenue, customs or administrative matters. There are some fields explicitly left out of the scope of the regulation, despite the fact that in practice they may be closely linked with the succession procedures itself. For example, according to article 1(2)(d) questions related to matrimonial property regimes are left out from the scope of the regulation. In practice, in order to establish the property subject to inheritance, it would be important to establish the matrimonial property regime within the succession procedures so that it would be possible to allocate the estate of a decease who was married at the time of death from the joint property of the spouses.

The Regulation may be divided into four parts. Firstly, it establishes common rules according to which it should be determined in which Member State the succession can be settled or whether the procedures should be commenced in a State not party to the European Union[4]. Secondly, it establishes the private international law rules of the European Union according to which it should be determined which law should be applied to the succession as a whole, whether or not it would be the law of a Member State.[5] Thirdly, it establishes rules on the recognition and enforcement of decisions,[6] authentic documents and court settlements of Member States[7] and finally, it establishes the European Certificate of Succession,[8] which would be issued upon request of interested party in all the Member States of the European Union, who are subject to the Succession Regulation.

It should be pointed out here that the regulation is applicable in all the Member States of the European Union except the United Kingdom, Ireland and Denmark,[9] Therefore those Member States should be treated as non EU countries within the meaning of the Succession Regulation.

Aim

From one side the Regulation provides legal security for the citizens of European Union by ensuring, that succession procedures are initiated and heard only in one Member State and that the law to be applied to the succession would be established according to same rules, no matter in which Member State the succession procedures should be carried out. It guarantees to the citizens of the European Union less bureaucracy, as the decisions, authentic documents and court decisions, as well as the European Certificate of Succession must be recognised and enforced by a Member State according to the rules of the Regulation no matter the Member State of origin.

[1] Article 84
[2] Point 9 of the Recital
[3] Articles 1(1) and 83(1)
[4] Articles 4-19
[5] Articles 20-38
[6] Articles 39-58
[7] Articles 59-61
[8] Articles 62-73
[9] points 82 and 83 of the Recital

If, so far, it is not rare that the succession matter could be ruled on in different Member States depending on the location of the property of the deceased, then the overall objective of the Succession Regulation with some exceptions is that proceedings should be brought only in one Member State. This definitely should easethe situation of the beneficiaries of the deceased, as there is no longer need for time consuming and costly succession proceedings in different Member States in the same cause of action. The common European Certificate of Succession in a form established by the Regulation[1] may be produced as a proof that succession procedures are conducted and that beneficiaries, who have the legitimate right to dispose the deceased's property are established on accurate bases.

However, from another side there are several practical problems that may rise with the application of the Succession Regulation. The aim of this analysis is to provide an overview of the regulation and to describe some shortcomings that may come up in practice in relation tothe establishment of jurisdiction and applicable law as well as to the European Certificate of Succession, in the application of the Succession Regulation.

The assessment of the rules of the Succession Regulation on the recognition and enforcement of decisions, authentic documents and court settlements of Member States is left out of this analysis, because those provisions are comparable to other legal acts of the European Union related to the recognition and enforcement of decisions, authentic documents and court settlements, such as Brussels I , recasted Brussels I a regulation[2] where long practice on the application of those rules together with the case law of the European Court of Justice has developed.

1. PROVISIONS ON JURISDICTION

KEY FINDINGS

The aim of the provisions on jurisdiction of the Succession Regulation could be described as the establishment of common rules which would be based on the same grounds in order to ensure that succession procedures in cross-border cases would be dealt with only by one authority of one Member State and that the citizens would not need to initiate proceedings in different Member States in the same cause of action.

1.1 Which Member State has competence to proceed with the succession matter?

The general jurisdiction of a Member State is defined in Article 4 of the Regulation, according to which the courts of the Member State in which the deceased had his habitual residence at the time of death shall have jurisdiction to rule on the succession as a whole. That means, that the court having jurisdiction established on the bases of the habitual residence of the deceased has the general power to rule on succession and its decision would be enforceable in all the Member States.[3] In order to ensure that succession proceedings are initiated only in one Member State, the jurisdiction must always be examined. When the court of a Member State concludes that it has no jurisdiction, it shall not proceed with the settlement of a succession matter[4] and if the

[1] Article 62 and Annex 5 of the Commission implementing Regulation (EU) 1329/2014 of 9 December 2014, establishing the Forms referred to in Regulation (EU) No 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.

[2] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[3] On enforceability see Articles 43, 60(1) and 61(1).

4 Articles 15

same case is brought up in different Member States the jurisdiction should be established before the settlement of a succession.

There are several different conditions where exemptions to the general rule of jurisdiction related to the habitual residence of a deceased may rise. For example, in the case where the habitual residence of a deceased was not in a Member State but the assets of the estate are located in that Member State.[1] In this case the court of a Member State where the assets of a deceased are located would have jurisdiction to rule on the succession matter on those assets.[2] This kind of cases may rise for instance where according to the private international law rules of a country where the deceased had habitual residence at the time of death, the succession matter should be settled in a country where the immovable property is situated.[3] For the same reason it may also occur that according to the general rule of jurisdiction of the Succession Regulation the court of a Member State would have competence but its decision would not be recognised and enforceable in relation to the assets of a deceased located in that third State.[4] In this type of cases also it may be that according to the laws of the country where the immovable property of a deceased is locate, the succession matter should be ruled in relation to those assets in that country.[5]

Exemption to the general rule of jurisdiction may also arise in cases where no Member States would have jurisdiction according to the provisions of the regulation but the proceedings could not be reasonably be brought and conducted in third state. In this case on exceptional bases the succession matter may be settled by the court of a Member State with which the case is closely connected. The Regulation highlights that the case must have sufficient connection with the Member State of the court seized but does not define the notion of "sufficient connection" so it would need to be decided on a case by case basis.[6] The aim of this provision is explained in the Recital of the Regulation that in order to remedy, in particular, situations of denial of justice, this Regulation should provide a forum necessitatis allowing a court of a Member State, on an exceptional basis, to rule on a succession which is closely connected to a third State. Such an exceptional basis may be deemed to exist when proceedings prove impossible in the third State in question, for example because of civil war, or when a beneficiary cannot reasonably be expected to initiate or conduct proceedings in that State. Jurisdiction based on *forum necessitatis* should, however, be exercised only if the case has a sufficient connection with the Member State of the court seized.[7]

If the abovementioned exemptions to the general rule of jurisdiction would generally be known and familiar in the legal systems of the European Union, then one of the biggest amendments in the succession laws of the Member States could be perhaps the exemption in cases where the deceased has left a will which enables the concerned parties to conclude written agreement on the choice of jurisdiction. According to Article 5 of the Regulation the concerned parties may conclude a written agreement in order to bring the succession proceedings to Member States, where the deceased did not have habitual residence at the time of death. Even though the choice of court agreement is nothing new under the private international law rules, it would be as novelty in the field of succession law. Indeed, so far according to domestic law jurisdiction on succession matters should be determined mainly on the bases of the last place of residence, nationality or on the bases of the location of property of the deceased.[8]

According to the Succession Regulation, if the law of the Member State was chosen by the deceased as applicable law to the succession as a whole, it is possible for the parties to bring the succession matter into the jurisdiction of the Member State, the nationality of the deceased at the time of making the will or at the time of death,[9] either by concluding a written agreement [1] or by expressly accepting and requesting it.[2] It should be

1 Article 10(1)

2 Article 10(2)

[3] The principle of *lex rei sitae* applies usually in common law systems, for example in the United Kingdom and USA.

[4] Article 12

[5] redundant see Footnote 16

[6] Article 11

[7] Point 21 of the Recital

[8] for the current legislation of the Member States see webpage on the Succession in Europe http://www.successions-europe.eu/en/home

[9] Article 22(1)

noted that this exemption is applicable only if the chosen law is the law of a Member State: the proceedings cannot be brought from the general jurisdiction into the jurisdiction of a court not subject to the Succession Regulation.

The general principle of the regulation is that the succession matter of a deceased may be carried out only in one Member State by one court.[3] If it appears that the succession proceedings have been initiated in different Member States, then the court of a Member State where proceedings were brought later, shall stay its proceedings until the jurisdiction of a court seized first[4] is established, in which case the latter shall decline its jurisdiction in favour of that court.[5] If there are related actions pending at first instance in courts of different Member States and they are so closely connected that it is expedient to hear them together in order to avoid conflicting decisions, then the court seized latter may decline its jurisdiction and the actions may be consolidated if the law of a Member State of the court first seized so permits.[6]

One of the preconditions for the chosen court to rule on the succession matter is that the court seized according to the general principles of jurisdiction has declined its jurisdiction in the same case if it has already initiated the proceedings.[7] When the parties have concluded the choice of court agreement it would be the obligation of a court having general jurisdiction to decline its jurisdiction, regardless of whether the proceedings were opened in court's own motion or on the request of the parties to the proceedings.[8]

When the deceased has stipulated in the will that the chosen law to the succession proceedings is the law of a Member State, then the court of a Member State having the general right of jurisdiction has the right to decline its jurisdiction also in cases, where one of the parties to the proceedings so requests for the reasons that the case would be better solved by the court of the Member State of the chosen law. The circumstances of the case, such as the habitual residence of the parties and the location of the deceased property must be taken into account in making such decisions on declining jurisdiction.[9] In case one of the parties to the proceedings has requested the general court of jurisdiction to decline its jurisdiction as the proceedings are already initiated, the chosen court may start with the proceedings only after the court having general competence has declined its jurisdiction.[10]

It should be noted that the Regulation makes a clear difference in cases where the court of a Member State where the habitual residence of the deceased was at the time of death declines its jurisdiction on the bases of a choice of court agreement concluded by the parties[11] from the cases were the parties have made a request for the court to decline the jurisdiction[12]. If the choice of court agreement must be in a written form and concluded between the parties concerned [13] then there are no requirements in the Succession Regulation on the form of a request for declining jurisdiction and it is enough that the request is made only by one of the parties.

As already described above, the court of the Member State whose law was chosen by the deceased as applicable law to the succession as a whole may rule on the succession in case the court of general jurisdiction has declined its jurisdiction and the parties concerned have concluded the choice of court agreement in a written form. However, it may also have jurisdiction in case the parties to the proceedings have expressly accepted the jurisdiction of the court seized[14] with the precondition that the court of general competence has declined its jurisdiction.[15] It should be noted that the written choice of court agreement and expressed

[1] Articles 5(1), 7(b)
[2] Articles 6(a) and 7(c)
[3] Articles 17 and 18 but it may also be derived from Articles 6, 7 and 8.
[4] The criteria for the determination which court has been seized first is provided in Article 14.
[5] Article 17
[6] Article 18
[7] Article 7(a)
[8] Articles 6(b) and 8
[9] Article 6(a)
[10] Article 7(a)
[11] Article 6(b)
[12] Article 6(a)
[13] Article 5(2)
[14] Article 7(c)
[15] Article 7(a)

acceptance by the parties to the proceedings are two different grounds for the chosen court to initiate succession proceedings and the Succession Regulation does not specify in which form such acceptance must be expressed. The chosen court may not initiate proceedings barely on the bases of a will but the wish to transfer jurisdiction should be expressed by the parties to the proceedings either in the written agreement or otherwise.

It could be concluded that the provisions according to which the courts may either decline jurisdiction on request of one of the parties or to rule on succession in case there is expressed acceptance of jurisdiction most probably may lead to a situation where succession procedures are carried out in that Member State whose law is applicable to the succession as a whole. However, it is possible only if the law applicable to the succession has been specified in the will and when all the parties to the proceedings agree with it.[1]

The Succession Regulation foresees some exceptions to the so called "one succession / one court jurisdiction" principle. In addition to the court having jurisdiction to rule on the succession, any person who, under the law applicable to the succession may make declarations within the succession procedure have the right to submit declarations to the courts of the Member State of the applicant's habitual residence and that court shall have jurisdiction to receive such declarations if under the law of that Member State, such declarations may be made before a court. According to the Regulation those would be the declarations on the acceptance or waiver of the succession, or declarations on legacy or reserved share, or declarations designed to limit the liability of the person concerned in respect of the liabilities under the succession.[2]

The regulation does not provide for the courts any responsibilities to exchange such declarations made and it would therefore be the responsibility of a person who made the declaration to communicate the necessary documents to the court which has jurisdiction to settle the succession. The court receiving declarations cannot consider them invalid for their form only for a reason that they were made in a different Member State. The Succession Regulation provides that the court of a Member State who has jurisdiction on the succession shall consider any such declarations made in another Member State valid as to their form if the declarations meet the requirements of the law applicable to the succession as a whole or the requirements of the law of a Member State in which the person making the declaration has habitual residence.[3]

Exceptions to the so called "one succession one court jurisdiction" principle is established also in Article 19 of the regulation according to which application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter. Such measures could be for example measures necessary for the administration of an estate.[4]

Hence, the exemption to the application of the Succession Regulation may appear also from international agreements that the Member State in question has concluded. According to the Regulation it shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of the regulation and which concern matters covered by the Succession Regulation. If Member States have concluded international agreements on matter governed by the Succession Regulation, then in relation to those States the Succession Regulation should be put aside and the jurisdiction and the applicable law should be established on the grounds of those international agreements, which were concluded before the adoption of the regulation, i.e. 4th of July 2012.[5] For instance Estonia has concluded legal aid agreements with Russia[6] and Ukraine[7] according to which the jurisdiction and applicable law of the succession depends also on the location of the property. In those cases the assessment should be conducted on the bases of those agreements. Similarly to those agreements Estonia has concluded legal aid agreements also with Poland[8] and Latvia and Lithuania,[1]

[1] See Article 9, according to which jurisdiction of a court may be accepted silently by appearing before the court or contested.

[2] Article 13

[3] Article 28

[4] See article 29 for special rules on the appointment and powers of an administrator of the estate

[5] According to the general principles of the European Union law, it is the obligation of the Member States not to conclude international agreements in the areas where the competences have been delegated to the European Union.

[6] RT II 1993, 16, 27

[7] RT II 1995, 13, 63

[8] RT II 1999, 4, 22

which amongst other things govern also succession matters on grounds of lex situs doctrine but as they are agreements with the Member States of the European Union, they should be put aside and succession matters should be dealt with only on the bases of the Succession Regulation.

1.2 Habitual residence – the central question of the regulation

The most important factor of the Succession Regulation is the habitual residence of the deceased, which is the general connecting factor for determining the jurisdiction of the courts as well as the applicable law to the succession as a whole. [2] What may remain problematic is that the Regulation itself does not define what is meant by habitual residence, nor does it lay down the criteria which would be necessary for the establishment of habitual residence.

Therefore, the determination of habitual residence may be difficult in practice, and in cases where the deceased has travelled between several Member States and was perhaps connected with all of them it would be even more complex as there is no criteria of what should be taken into account.[3]

However, it should be taken into consideration that even though there is no case law of the European Court of Justice in the area of succession, the court has ruled in other areas that the term habitual residence has community wide meaning[4] and it has an autonomous meaning specific to EU law.[5] Where a connection may be established between a person's legal position and the legislation of a number of Member States, the Court has held that the concept of the Member State in which a person resides refers to the State in which that person habitually resides and where the habitual centre of his interests is to be found.[6]

It can be seen from the case law of the Court of Justice and the Court of First Instance that a person cannot have habitual residence in different Member States and that single factors such as the possession of immovable property, payment of taxes, registration of residence etc. cannot alone constitute an element on the bases of which the habitual residence of a person is established. The court has found that habitual residence requires some form of permanency and the intention to reside should be of a lasting character, where is the permanent or habitual centre of the interest of the person concerned.[7] In assessing, whether the deceased had the habitual residence in a Member State, then all the factual circumstances should be taken into account.

It is also explained in the Recital that in order to determine the habitual residence, the authority dealing with the succession should make an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence. The habitual residence thus determined should reveal a close and stable connection with the State concerned taking into account the specific aims of the regulation.[8]

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[1] RT II 1993, 6, 5

[2] Articles 4 and 21 but see also Articles 13 and 28, where habitual residence would be the basis for making declarations related to the acceptance or waiver of succession or legacy or reserved share or declarations on limiting liability.

[3] See points 24 and 25 of the Recital

[4] See for example C-90/97 *Swaddling*, point 29

[5] C-255/13, *I v Health Service Executive*, point 43, but see also C-66/08 Szymon Kozlowski, points 41 and 42. In point 46 of the same decision the court found that the terms 'resident' and 'staying' cover, respectively, the situations in which the person who is the subject of a European arrest warrant has either established his actual place of residence in the executing Member State or has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence.

[6] C-489/10 *Janina Wencel*, point 49, see also C-372/02 *Roberto Adanez-Vega*, point 37.

[7] See for example C-452/93 *Pedro Magdalena Fernández*, point 23 and T-298/02 *Anna Herrero Romeu* point 51 and C-497/10 PPU *Barbara Mercredi v Richard Chaffe*, point 51, which states "In that regard, it must be stated that, in order to distinguish habitual residence from mere temporary presence, the former must as a general rule have a certain duration which reflects an adequate degree of permanence. However, the Regulation does not lay down any minimum duration. Before habitual residence can be transferred to the host State, it is of paramount importance that the person concerned has it in mind to establish there the permanent or habitual centre of his interests, with the intention that it should be of a lasting character. Accordingly, the duration of a stay can serve only as an indicator in the assessment of the permanence of the residence, and that assessment must be carried out in the light of all the circumstances of fact specific to the individual case."

[8] Point 23 of the Recital

1.3 Authorities subject to the jurisdiction provisions of the Succession Regulation

According to the provisions on jurisdiction in chapter 2 of the Succession Regulation it can be seen that the courts of the Member States would be bound to apply the provisions on jurisdiction.

However, the Regulation in ts Article 3 (2),provides to the term "court" a much wider meaning not covering only courts. Accordingly for the purposes of the regulation, the term 'court' means any judicial authority and all other authorities and legal professionals with competence in matters of succession which exercise judicial functions or act pursuant to a delegation of power by a judicial authority or under the control of a judicial authority. The provision sets a condition that such other authorities and legal professionals offer guarantees with regard to impartiality and the right of all parties to be heard and their decisions are subject of an appeal to or review by a judicial authority and that their decision have similar force and effect as a decision of a judicial authority on the same matter.

In practice, the succession procedures are pursued in many different Member States by notaries who most probably do not qualify under the term of courts within the meaning of the Regulation and are therefore not bound to apply the provisions on jurisdiction as it is foreseen by chapter 2 of the regulation according to which it should be decided in which Member State the succession procedures should be initiated. Indeed in most Member States the notaries do not deal with succession matters under the delegation of courts nor have their decisions similar effect as the decisions of a judicial authority and they cannot be regarded as judicial authorities.

It is also described in the Recital of the Regulation that whether or not the notaries in a given Member State are bound by the rules of jurisdiction set out in the Succession Regulation should depend on whether or not they are covered by the term 'court' for the purposes of the regulation.[1] The term 'court' should not cover non-judicial authorities of a Member State empowered under national law to deal with matters of succession, such as the notaries in most Member States where, as is usually the case, they are not exercising judicial functions.[2]

In most of the cases it could be said that succession procedures would begin with the initiation of the proceedings and come to an end after the beneficiaries of the deceased are established as a result of which in the light of the Succession Regulation the European Certificate of succession could be issued.[3] Therefore, there are quite many Member State were notaries would most probably not qualify under the term court within the meaning of the regulation but they still would be competent to issue European Certificates of Succession because they are the only authorities responsible for the succession procedures in a given Member State.[4]

The Member States are obliged to notify the European Commission of the authorities and legal professionals falling under the term court, the list of which shall be published in the Official Journal according to the provision of the regulation which entered into force on 5th of July 2012.[5] The Member States were also bound to notify the Commission of the authorities who are competent to issue the European Certificate of Succession by the 16th of November 2016.[6] At the time of writing this analysis there is no official source published yet by the European Commission whereby it could be seen which authorities of the Member States would qualify under the term "court" and be bound by the jurisdiction provisions of the regulation, and which authorities of the Member States would be competent to issue European Certificates of Succession.

The provisions of the regulation related to the establishment of the jurisdiction together with article 3(2) and the explanations given in the Recital of the regulation according to which authorities such as notaries, who would not be bound by the jurisdiction provisions of the regulation could be regarded as misleading in cases were such authorities are dealing with the succession matters and are responsible and competent for issuing

[1] Point 21 of the Recital

[2] Point 20 of the Recital

[3] Derived from Articles 63 and 67

[4] The authorities of the Member States responsible for the succession matters may be found from Succession in Europe webpage http://www.successions-europe.eu/en/home

[5] Articles 3(2), 79, 84

[6] Article 78(1)(c)

European Succession Certificates. There is a possible conflict codified into the regulation itself in this kind of cases.

As regulations are directly applicable in all the Member States it could be said that it is not only the obligation of the courts to accept the jurisdiction of the court of a Member State whose law has been chosen by the parties to the proceedings in case the last will of a deceased enables it. It is also the right of the parties to the proceedings to request either by written choice of court agreement or otherwise that the proceedings of succession are ruled in different Member State than the court of a Member State where the deceased had last habitual residence. Those rights of the parties to the proceedings should be respected and guaranteed in all the Member States, nevertheless whether the succession is settled by judicial or non-judicial authorities.

This idea is supported also by article 8 of the Succession Regulation, according to which the court which has opened succession proceedings of its own motion as it has the general jurisdiction shall close the proceedings if the parties to the proceedings have agreed to settle the succession amicably out of court in the Member State whose law had been chosen by the deceased.

Hence, the court of a Member State were the deceased habitual residence was at time of death is bound to examine whether it has jurisdiction[1] and must respect the wishes of the parties and decline its jurisdiction in case it receives the choice of court whereby the jurisdiction is transferred to non-judicial authority of another Member State.[2]

It is explained in Recital that the non-judicial authorities are not bound by the jurisdiction provisions[3] and that in such a situation, it should be for the parties involved, once they become aware of the parallel proceedings, to agree among themselves how to proceed. If they cannot agree, the succession would have to be dealt with and decided upon by the courts having jurisdiction under this Regulation.[4] The provisions on jurisdiction do not provide any obligations to the non-judicial authorities of the Member States to examine whether they would have competence before the proceedings would be initiated either on the bases of the will or on the bases of general jurisdiction.

This may lead to the situation where the same case of succession is solved by non-judicial authorities of different Member States and in case the parties to the proceedings do not contest it, there will be several decisions made in the same succession matter. However, it is not an obligation for the parties to reach an agreement and they are free to choose that proceedings are settled by non-judicial authorities of different Member States if they so wish.

The situation may be somewhat different in case the non-judicial authorities are competent to issue European Certificates of Succession. According to article 64 of the regulation the European Certificate of Succession shall be issued in the Member State whose courts have jurisdiction under the provisions of the regulation either by the court in its broader meaning or by another authority which, under national law has competence to deal with matters of succession. Derived from the obligation and competence of non-judicial authority to issue European Certificates of Succession it must before doing so, assess whether it had the right to settle the succession matter according to the provisions on jurisdiction of the regulation. Article 64 of the regulation explicitly refers to Articles 4, 7, 10 and 11, which are the rules to be followed in determination of the jurisdiction before the non-judicial authority is entitled to issue the European Certificate of Succession.

It would be important to note that the use of the European Certificate of Succession is not mandatory[5] and it is issued on voluntary bases only when the beneficiaries of succession have applied for it.[6] It is not up to the

[1] Article 15
[2] Article 8 and 6(b)
[3] Point 20 of the Recital
[4] Point 36 of the Recital
[5] Article 62(2)
[6] Articles 65(1) and 63(1)

authorities settling the succession to decide whether the certificate should be issued in a given case and it is doubtful that they are entitled to refuse from it after the receipt of an application.[1]

Keeping in mind that there is no time limit as to when the European Certificate of Succession can be applied after the case has been settled and that the authorities cannot be sure that applications for the European Certificate of Succession would not be submitted years after the case has been settled, then for legal security reasons it would be necessary that jurisdiction of a non-judicial authority is assessed according to the provisions of the regulation before the procedures are initiated and not later. Only in this way it could be ensured that the authority does not come to different opinion on the matter of jurisdiction after the succession procedures have been brought to an end.

It is therefore concluded, that the provision on jurisdiction of the Succession Regulation are not only binding on courts with its broader meaning but also on all the non-judicial authorities of the Member States who would be competent to issue the European Certificates of Succession.

With this respect it is questionable how reasonable it is that by virtue of article 64 of the Succession Regulation the authority of Member State issuing European Certificates of Succession in examining its jurisdiction is only bound by Articles 4, 7, 10 and 11 but not the other provisions of jurisdiction.

For example, the chosen court, which by virtue of Article 64 includes the non-judicial authorities, may pursuant to article 7 exercise its jurisdiction only in so far, as the parties to the proceedings who were not parties to the choice of court agreement do not contest its jurisdiction. According to Article 9 of the regulation where, in the course of proceedings before a court of a Member State exercising jurisdiction pursuant to Article 7, it appears that not all the parties to those proceedings were party to the choice-of-court agreement, the court shall continue to exercise jurisdiction if the parties to the proceedings who were not party to the agreement enter an appearance without contesting the jurisdiction of the court. If the jurisdiction of the abovementioned court is contested by parties to the proceedings who were not party to the agreement, the court shall decline jurisdiction.

Hence, it is the right of any party of the proceedings who is not a party to the choice-of court agreement to contest the jurisdiction by appearing before the court. Should Articles 64, 7 and 9 together be interpreted in a way that party to the proceedings may contest the jurisdiction also by way of appearing before non-judicial authority or should it be interpreted in a way that the choice of court agreement may be contested only before courts within the meaning of the succession regulation?

As in the Member States of the European Union anyone can turn to the court for the protection of their rights, it would be probably more in the interest of the parties in the proceedings to grant them right to contest the jurisdiction at first instance before the authority solving the successions with an obligation of any non-judicial authority to take into account the objections. With this interpretation the succession proceedings would be less bureaucratic, less time consuming and cheaper and more efficient for the citizens.

As Article 64 together with Articles 7 and 9 could be interpreted differently by the non-judicial authorities and the uniform application of Article 9 is not ensured, then the Member States may foresee with their internal succession procedures that the non-judicial authorities dealing with the succession matters would be bound also by other provisions on jurisdiction. In this way in addition for the benefits to the parties, it could also lower the workload of the courts of the Member States.

1.4 Some practical questions related to the establishment of jurisdiction

There are some ambiguities that may arise with respect to the provisions of the Succession Regulation that are related to the choice of court agreements and the right of the parties to the proceeding to request the court to decline jurisdiction and to oblige the chosen court to rule on succession in cases where the parties to the proceedings have expressly accepted the jurisdiction of a chosen court.

[1] Article 64(1) and according to Article 67(1) the certificate shall be issued without delay after the elements to be certified have been established.

Firstly, the question on how to identify the persons expressing their intentions if they have not appeared in the court in person may be important for legal security reasons. It may well be that the intentions of the parties have been communicated from another Member State. According to the succession regulation the dated and signed agreement on choice of court may be concluded in written form and any communication by electronic means which provides a durable record of the agreement shall be deemed equivalent to writing.[1] The regulation itself does not provide requirements on the form of the request to decline the general jurisdiction and expressed acceptance of the jurisdiction of a chosen court.

Would that mean, that the court in question has the right to demand that any such agreements or requests and expressed wishes in relation to the jurisdiction of the court are made in a form, that the signatures are certified by the authorities of the Member States or signed electronically, so that it would possible to identify the persons expressing those intentions or would it be the right of the parties to demand that any such intentions are communicated to the court by e-mail or by post in a simple letter without the possibility to identify whose intentions they really are?

In practice, in order to prevent any fraud and to provide legal security that the decisions on succession would not be contested by the parties having legitimate interest by reason that they were not heard nor aware of the proceedings, it would be important for the court to identify the person who has expressed the intentions, so that there would be no grounds for disputes for those reasons. Keeping in mind that the European Certificate of Succession issued at the end of the succession proceedings could be used as an instrument of the proof of legitimate interest of the persons having direct rights in the succession, such as heirs, legatees, executors etc. and that it could be used as a reliable document in transfer of property, it should be the responsibility of a court to ensure that the information therein is accurate and not based on fraud.

Secondly, it remains somewhat unclear who are the persons having the power to decide that the succession procedures should not be dealt with by the court having general jurisdiction and brought into the jurisdiction of the court of a Member State whose law was chosen in the last will of the deceased.

As already described above, the court of general jurisdiction has to decline the proceedings on the bases of the written choice of court agreement concluded between the parties concerned or on the bases of the request made by one of the parties to the proceedings and the chosen court would have jurisdiction in addition to the above mentioned agreement also on the bases of a expressed acceptance of the jurisdiction made by the parties to the proceedings. The notion of "parties concerned" and "parties to the proceedings" are not defined in the Succession Regulation.

According to point 28 of the Recital it would have to be determined on a case-by-case basis, depending in particular on the issue covered by the choice-of-court agreement, whether the agreement would have to be concluded between all parties concerned by the succession or whether some of them could agree to bring a specific issue before the chosen court in a situation where the decision by that court on that issue would not affect the rights of the other parties to the succession.

If according to the explanations given by the legislator in the Recital the parties of the choice of court agreement could be decided on a case by case basis then according to Article 9 of the Succession Regulation the chosen court may exercise its jurisdiction only so far that its jurisdiction has not been contested by a party to the proceedings, who has not signed the choice of court agreement. In case the party of the proceedings would contest the jurisdiction by appearing to the court and contests it, the proceedings should be carried out by the court having the general jurisdiction. As the regulation itself does not specify any time limits for contesting the jurisdiction and according to Article 9(1) the jurisdiction may be accepted by appearing to the court, then in practice that means that the chosen court must in any event ensure that all the parties to the proceedings are aware of the proceedings and the choice of court agreement before ruling on succession.

It would be inevitable for the valid final decision that all the parties to the proceedings would be at least informed that the jurisdiction has been transferred and to provide them in this way the possibility to appear

[1] Article 5(2)

into court as stipulated in Article 9(1) of the regulation in order to remain impartial and offer guarantees with regard the right of all parties to be heard.

The question is, whether the Regulation in granting the right to contest the jurisdiction to the parties of the proceedings grants it to persons who would have the right to initiate the succession proceedings or the persons who would have some rights in case of intestate succession or would they be the beneficiaries appointed by the will of a given case?

Most probably in trying to find an answer at first it would be important to decide whether the persons to the proceedings should be determined according to the rules of a Member State who has general jurisdiction or according to the laws of a Member State, whose laws should be applied to the succession according to the last will or both? As according to Article 23(1) the determined law applicable to the succession governs the succession as a whole, it could be concluded that the parties to the proceedings who would have the right to contest the jurisdiction of a chosen court should be determined according to the law of a Member State whose law will be applied to the succession as a whole.

The problems that may arise in practice could well be demonstrated on the bases of Estonian succession law. According to the Law of Succession Act[1] difference could be made between three different groups of persons and it may be arguable in the light of the Regulation which one of them would have the right to influence the transfer of jurisdiction from the court of a general jurisdiction to the chosen court. In the light of Estonian law they probably could all qualify as parties to the proceedings within the meaning of the Regulation. The possible circle of people qualifying as parties to the proceedings could mainly be divided into three groups.

Firstly the possible beneficiaries in case of the testate succession, who could be the beneficiaries appointed in the will or the persons having a right for the reserved share. In the Estonian legal system the right for a reserved share may raise for children, spouse or the parents of the deceased in case they are disinherited and the deceased had a maintenance obligation towards them at the time of death.

Secondly they could be the persons having the right to inherit in case of intestate succession, who would be the relatives of the deceased to be determined according to law in three orders and a spouse. In case the deceased had no relatives and was not married, then the state would have the right for succession.

Finally the parties to the proceedings within the meaning of the Succession Regulation could be the persons who have the right to initiate succession proceedings. Hence all the persons described above in case of testate and intestate succession and all the creditors of the deceased person who amongst others could also be the ex-spouse of a deceased having the right to demand the division of joint property obtained during the marriage.

In practice the circle of persons qualified as parties to the proceedings could be different and it could be difficult to decide who has the power to demand the transfer of jurisdiction on case-by-case bases. For example it could perhaps not be justified that thecreditor of a deceased person in one Member State qualifies as a party to the succession proceedings but does not have any such rights in another Member State.

Keeping in mind the direct effect of EU regulations and that it should have similar application in different Member States it is well possible that in the succession cases the terms parties concerned and parties to the proceedings should have same meaning in all the Member States and that they should have the meaning derived from the law of the European Union, not from the laws of the Member states. As there may be different interpretations in the Member States as to who could be regarded as a party in the proceedings it would remain questionable who would be the persons who could rely on article 9 of the Succession Regulation and contest the jurisdiction by claiming that their right to be heard derived from the Succession Regulation was not guaranteed before the decision on succession was taken by the chosen court.

[1] RT I, 29.06.2014, 10

2. PROVISIONS ON APPLICABLE LAW

KEY FINDINGS

The aim of the provisions of the Succession Regulation on determining the applicable law is to ensure that same principles are applied in all the Member States and that the last wishes of the deceased are respected.

2.1 The law to be applied

When the law to be applied to the succession is established according to the rules of the regulation, then it does not matter whether it is the law of a Member State of a European Union or any other country and it should be applied to the succession as a whole.[1]

In determining the applicable law, the general rule of the Regulation is that the law applicable to the succession as a whole shall be the law of the country in which the deceased had his habitual residence at the time of death.[2]

In exceptional cases, if it appears from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected[3] with another country than the state of the deceased's habitual residence at the time of death, then the law applicable to the succession shall be the law of that other State. There are no provisions on what could constitute "manifestly more closely connected". An explanation may be found from the recital where an example is provided in cases the deceased had moved to the State of his habitual residence fairly recently before his death and all the circumstances of the case indicate that he was manifestly more closely connected with another State. That manifestly closest connection should, however, not be resorted to as a subsidiary connecting factor whenever the determination of the habitual residence of the deceased at the time of death proves complex.[4]

The general rule on applicable law would not be applied if the deceased had made a will or concluded a succession agreement whereby the applicable law was chosen or it is demonstrated by the terms of such disposition of property upon death.[5]

If according to the general rule the applicable law would be the law of the State where the deceased had habitual residence at the time of death,[6] then the regulation enables to choose with the will, joint will or succession agreement that the law to be applied to the succession would be the law of a state whose nationality the person possesses at the time when the choice is made or the nationality what is possessed at the time of death. In case the person holds several nationalities, then it is possible to choose between any nationality that is possessed at the time when the choice is made or at the time of death.[7]

According to the Succession Regulation it is possible to choose the law of one State only and when the person has made a choice of law, then that law is applied to the succession as a whole. The Regulation provides a non-exhaustive list of matters, such as the capacity to inherit, liability of debts, sharing the estate etc. that fall within the scope of the applicable law[8].

[1] Article 20
[2] Article 21(1)
[3] Article 21 (2)
[4] Point 25 of the Recital
[5] Articles 22(3) and 3(1)(d)
[6] Article 21(1)
[7] Article 22(1)
[8] Articles 23

It is not possible to indicate in the last will that for the assets located in different States the law of a State where the assets are located should be applied to the succession in relation of those assets, redardless of their quality as immovable or movable property. However whenever making any such choices the person should keep in mind that in some States, for example the countries of a common law system, the general rule of succession could be, that if the immovable property is located in that State, then according to the lex situs doctrine in force in that State the law of the State where the immovable is located should be applied in relation to succession of that property.[1]

In addition to rules on choice of law that could be chosen when making orders for the disposialof property upon death, the Succession Regulation also provides rules on the assessment of substantive validity of such acts[2], by listing a comprehensive list of elements which should be assessed according to the provisions of the regulation, such as the interpretation of the act, the determination of beneficiaries and their share in the succession, capacity to inherit etc.[3]

The Regulation also provides in Article 27 a set of rules according to which the formal validity of wills, joint wills and succession agreements made in a written form should be assessed.[4] There are many similarities between the rules set out in the Succession Regulation and the ones set out in the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.[5] If on one hand both acts should be applied to all types of dispositions of property upon death, as the Succession Regulation should be applied to wills, joint wills and succession agreements and the Convention applies to the form of testamentary dispositions made by two or more persons in one document,[6] there are also differences to what should be taken into account. For instance, according to the Succession Regulation the provisions on the validity of dispositions of property upon death would be applied only in case they are made in written form and it is expressly provided that the regulation does not apply to the formal validity of dispositions of property upon death made orally,[7] then according to Article 10 of the Convention each Contracting State may reserve the right not to recognise testamentary dispositions made orally, save in exceptional circumstances, by one of its nationals possessing no other nationality.

There may be cases where it would be important to decide whether the assessment of the formal validity of dispositions of property upon death should be made on the bases of the regulation or on the bases of the convention. Even though regulations have direct effect and they are directly applicable, the general principles of the law of the European Union must respect also international law rules and the obligations of the Member States therein. That principle is also set in the Succession Regulation, which provides that it shall not affect the application of international conventions to which one or more Member States are party at the time of adoption of the regulation on the matters covered by the Succession Regulation. That means that in case Member States have concluded multilateral or bilateral agreements with States who are not Member States of the European Union then their obligations from those bilateral agreements on matters governed by the regulation should be fulfilled.[8]

Reference is made in the Succession Regulation[9] to the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions and it is provided that Member States which are

[1] The principle of lex rei sitae applies for example in the United Kingdom and USA.
[2] Article 25 on succession agreements and Article 24 on all other forms of acts on disposition of property upon death.
[3] Article 26
[4] Article 27
[5] Convention may be found from http://www.hcch.net/index_en.php?act=conventions.text&cid=40
[6] according to article 4 of the Convention
[7] Article 1(2)(f)
[8] See explanations also under point 1.1.
[9] Article 75(1)

Contracting Parties to this convention shall continue to apply the provisions of that Convention instead of Article 27 of the Succession Regulation with regard to the formal validity of wills and joint wills.[1]

Even if according to the Convention rules of conflicts laid down in the Convention shall apply independently of any requirement of reciprocity,[2] in cases where the authority of a Member State, which is a party to the Convention settles a succession according to the law of a Member State which is not party to the Convention, then in such cases most probably the Succession Regulation should be applied for assessing the validity of a will. The Convention does not constitute an internal law of that Member State and would not be applied in that Member State.[3]

According to the Succession Regulation the substantive validity of the will whereby the choice of law was made shall be governed by the chosen law[4] and the will or any amendments thereto must be done in the form that correspond to the formal requirements of disposition of property upon death.[5]

The Regulation would be applied to the succession of persons who die on or after 17 August 2015. Any choices of law made before that date shall be considered to be valid and any dispositions of property upon death shall be admissible and valid in substantive terms only if they correspond with the rules and conditions provided in Chapter III of the Succession Regulation or if it is valid in application of the rules of private international law which were in force, at the time the choice or the disposition was made, in the State in which the deceased had his habitual residence or in any of the States whose nationality he possessed or when the disposition was made, in the Member State of the authority dealing with the succession. If a disposition of property upon death was made prior to 17 August 2015 in accordance with the law which the deceased could have chosen in accordance with the Regulation, that law shall be deemed to have been chosen as the law applicable to the succession.[6]

Even though the Regulation itself shall be applied only to the succession of the estate of deceased persons,[7] it appears from the content of the regulation that it also stipulates specific rules which should be taken into account also when any orders on disposition of property upon death are made, such as wills, joint wills or agreements to succession. As the Succession Regulation is applied only to successions of persons who die after 17th of August 2015 and considering the specific rules of the regulation when assessing the validity of the dispositions of property on death, the authorities of the Member States, such as notaries, who authenticate last wills and succession agreements, should advice their clients in authenticating any such documents in the light of the Succession Regulation already today in order to ensure that there would be no doubt in the validity of such acts in the future.

2.2 Some practical questions related to the application of foreign law

When the choice of applicable law is made in the disposition of property upon death, then the law of a State whose nationality is possesses at the time of making the choice or at the time of death may be indicated. There are two issues that should be taken into consideration with that respect.

Firstly, in case the person has the right to choose between several laws or in case according to the choice the applicable law would not be the law of a State where the person has habitual residence, then the effects of that law to the succession should be taken into account. For example, the rules of Member States on reserved share

[1] Article 75(1)

[2] Article 6 of the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Disposition

[3] By 04.06.2012 Bulgaria, Cyprus, Czech Republic, Hungary, Latvia, Lithuania, Malta, Romania and Slovakia are not parties to the convention. Italy and Portugal have signed, but not ratified it. See the webpage of Hague Conference on Private International Law http://www.hcch.net/index_en.php?act=conventions.status&cid=40 for the parties of the Convention.

[4] Article 22(3)

[5] Article 22(4). The rules on formal validity of disposition of property upon death are provided in Article 27 of the regulation and in the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.

[6] Article 83

[7] Article 1

may be completely different and therefore provide a different solution for the case when applied to the succession.

This could be illustrated by the legislation in force in Estonia and Belgium, where unlike in Estonia the spouse always receives usufruct. According to Estonian legislation, the reserved share may be claimed by the children, spouse and the parents of the only if the deceased has disinherited them with the condition that the deceased had a maintenance obligation toward them derived from the Family Law Act. The reserved share is financial claim, which gives to the beneficiaries a right to claim from the heirs in case of testate succession money in the size which amounts to one-half of the value of the share of an estate which a successor would have received in the case of intestate succession.[1]

Belgian law recognises the principle of reserved portions, whereby a minimum portion (the reserved portion) of the succession must devolve to the surviving spouse, children, father and mother of the deceased. This reserved portion amounts to half of the succession if there is one child (or descendant), 2/3 where there are two children and 3/4 if there are three or more children. If there are no descendants or a surviving spouse, the father and mother are each entitled to a quarter of the succession. The surviving spouse always receives at least the usufruct of half of the assets comprising the inheritance. This half will include at least the usufruct of the property used as the main home and its furniture.[2] Hence, when the choice of law is made, then in the differences in substance of the succession laws of different countries should be taken into account.

Secondly, even if according to the regulation the choice of a State whose nationality is possessed at the time of death would be considered as valid, it could be questionable within the succession procedures what the testator's exact wishes were at the time of making the will. This is because in choosing the law of a Member State whose nationality the testator might have in the future (i.e. at the time of death), the testator by not knowing the future nationality could perhaps not be aware of the effects of the will to the succession and did not understand the content of the disposition of property upon death that was made. It would therefore be dangerous to choose as an applicable law to succession the law of a state whose nationality will be possessed in the future.

It should also be considered that even if the provisions on jurisdiction of the regulation would in most of the cases enable to bring the succession proceedings to the Member State whose law was chosen by the last will of the deceased, the cases in which the authorities of a Member State must apply foreign law would still not be rare. According to the succession regulation if the party to the succession has a right to submit a declaration concerning the acceptance or waiver of the succession, of a legacy or of a reserved share, or a declaration designed to limit the liability of the person concerned in respect of the liabilities under the succession, then it may be submitted to the courts of the Member State where is the habitual residence of the person wishing to make such declarations is.[3] As to the validity of form of the declaration, it must comply either with the formal requirements of the laws of a Member State where the declaration is made or to the laws of the state, whose law is applicable to the succession but in substance it must be done in accordance of the laws applicable to the succession as a whole.[4]

The application of foreign law is not that easy in practice, as already for the language barriers it would be difficult to establish its exact content. To some extent it might be possible to receive help from the European Judicial Network in civil and commercial matters, where according to Article 77 of the regulation the European Commission has an obligation to make available short summary of the Member States national legislation and procedures relating to succession, including information on the type of authority which has competence in matters of succession and information on the type of authority competent to receive declarations of acceptance or waiver of the succession, of a legacy or of a reserved share.

[1] §§ 104, 105 of the Law of Succession Act

[2] Succession in Europe webpage http://www.successions-europe.eu/en/belgium/topics/restrictions-on-the-freedom-to-dispose-of-ones-succession-by-will/

[3] Article 13

[4] Article 23(1)

Even though the Member States are obliged to up to date such information, it would be difficult to apply a foreign law merely based on summaries. This is where it would perhaps be more helpful that the courts of the Member States cooperate on the matters of succession, for example by providing assistance on the content of law, where declarations on acceptance or on the waiver of succession are made, in order to ensure their validity. It should be noted that this type of cooperation exists amongst notaries of Europe who cooperate and assist each other amongst other things also in cross border cases within the networks established by the Council of the Notariats of the European Union (CNUE).[1]

3. EUROPEAN SUCCESSION CERTIFICATE

KEY FINDINGS

The aim of the European Succession Certificate could be described as to provide to the citizens a Europe-wide document issued on voluntary bases, which enables to prove that succession proceedings of a deceased have been conducted and that it has been established in those proceedings that they have legitimate interests towards the deceased property in one way or another.

The Regulation creates the European Certificate of Succession as a document which could be used by heirs, legatees having direct rights in the succession and executors of wills and administrators of the estate in order to invoke their status or exercise their rights in another Member States to demonstrate their status and their rights.[2] The European Certificate of Succession produces its effects in all the Member States, without any additional procedures.[3] It may be issued in cross-border cases and it is mainly meant for the use in another Member State, but once issued, it must be accepted also by the authorities of a Member State where it originates from.[4]

The European Certificate of Succession is not a mandatory document[5] and it is issued only in case application by the heirs, legatees having direct rights in the succession or executors of wills or administrators of the estate has been submitted in order to prove their rights in another Member State.[6] Once the application is made, the authority of a Member State must issue the European Certificate of Succession without delay[7] and it has the obligation to inform all the beneficiaries that an application for the European Certificate of Succession has been submitted[8] and that the certificate itself has been issued.[9]

The regulation lays down detailed rules on the application of the European Certificate of Succession by listing the points that must be provided in the application and foresees the establishment of a voluntary application form[10] as well as the issues that must be examined and verified by the authorities of the Member State receiving it. According to the Regulation, the applicant of the European Certificate of Succession must show in the

[1] To find out more about CNUE see http://www.notaries-of-europe.eu/
[2] Article 63
[3] Article 69(1)
[4] Article 62(3)
[5] Article 62(2)
[6] Article 64(1)
[7] Article 67(1)
[8] Article 66(4)
[9] Article 67(2)
[10] The application form is established in Annex 4 of the Commission implementing Regulation (EU) 1329/2014 of 9 December 2014, establishing the Forms referred to in Regulation (EU) No 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.

application amongst other things also the intended purpose of the certificate[1] accompanied by the necessary documents to the extent that is necessary for the issuing authority to verify the information provided.[2]

In fact it is the certified copy of the European Succession Certificate which will be issued to the applicant and which would be in force only for six months.[3] To that end the issuing authority must register the persons who have received the certified copies of the certificate and the original remains with the issuing authority.[4] The issuing authority is entitled to issue the certified copy of the certificate also to any persons who would demonstrate their legitimate interest.[5] Most probably this provision could be interpreted more widely, so that in addition to heirs, legatees and executors of wills and administrators of the estate,[6]who have the right to apply for the certificate, it could also include the creditors of the deceased, who could prove their legitimate interest and be entitled to receive a certified copy of the certificate once it has been issued.

As the European Certificate of Succession co-exists together with the certificates that Member States are issuing and does not replace any internal documents of the Member States, which are issued for similar purposes,[7] the persons entitled to apply for the European Certificate of Succession have the freedom to choose whether they would like to invoke their rights in another Member state on the bases of the European Certificate of Succession or on the bases of the Member State's internal document. If it would be the internal document of a Member State, then according to the Regulation an authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin and person wishing to use an authentic instrument in another Member State may ask the authority establishing the authentic instrument in the Member State of origin to fill in the form established in accordance with the regulation describing the evidentiary effects which the authentic instrument produces in the Member State of origin.[8]

It is specified in the rRegulation that the European Certificate of Succession may be issued only by the authorities of a Member State which have jurisdiction to settle a succession[9] and as the succession procedures may be carried out only in one Member State there can be only one European Certificate of Succession issued in the same case. That would be ensured also by the fact that according to the regulation the issuing authority is obliged to modify or withdraw the certificate of succession whether upon request or on its own motion in case the facts indicated in the certificate or the certificate itself is not accurate. Hence, when it turns out that the authority which issued the certificate did not have jurisdiction to do so, then the European Certificate of Succession should be withdrawn. If the European Certificate of Succession has been modified or is withdrawn, the issuing authority is obliged to inform all the persons who have received the certified copy that it has been modified or withdrawn.[10]

The Succession Regulation lays down a list of the compulsory elements that must be included in the content of the European Certificate of Succession.[11] The latter is established by means of Annex 5 of the Commission implementing Regulation (EU) 1329/2014 of 9 December 2014, establishing the Forms referred to in Regulation (EU) No 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. Therefore, it is not in the discretion of the issuing

[1] Article 65(3)(f)
[2] Article 65(3)
[3] Article 70(3)
[4] Articles 70(2) and 70(3)
[5] Article 70(1)
[6] The list of persons entitled to submit an application is provided in Articles 65(1) and 63(1).
[7] Article 62(3)
[8] Article 59. Form to be used for the attestation concerning an authentic instrument in a matter of succession is established in Annex 2 of the Commission implementing Regulation (EU) 1329/2014 of 9 December 2014, establishing the Forms referred to in Regulation (EU) No 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.
[9] See point 1.3. on the authorities issuing certificates.
[10] Article 71
[11] Article 68

authority to decide how the certificate should look like and what elements it should contain to the extent required for the purpose for which it is issued.[1]

Derived from Article 69 of the Regulation, the elements shown in the European Certificate of Succession are presumed to be accurate and there should be no restrictions or conditions related to the rights and powers of the heirs, legatees and the executors of wills and the administrators of the estate, which would not be shown in the European Certificate of Succession. The certificate must be a reliable document so that the authorities of another Member State could be sure that the persons wishing to dispose the property of a deceased person or wishing to correct in the register of a Member State data on the property in the ownership of a deceased person have all legal rights for doing so.

As any recordings in the registers of rights of immovable and movable property and the legal requirement of recording are excluded from the scope of the Succession Regulation[2] it is obvious that in cases where the succession matters are ruled on in different Member State than the State where the property is located, no modifications in the registers of the Member States can be done automatically. Some action on behalf of the beneficiaries and the authorities of the Member State where the property is located is needed, so that it would be possible to delete the name of the deceased from the registers and replace it with the names of the beneficiaries. That could be for example an application on behalf of the beneficiaries and examination of the content of the European Certificate of Succession by registries or other authorities of a Member State in order to establish the legal right of the beneficiary to submit an application. The European Certificate of Succession in itself does not create any legal rights, it is only a document to be used in order to demonstrate some factual circumstances, such as that the succession procedures have been conducted and that the beneficiaries have been established.

In comparing the requirements of the Succession Regulation – the elements in the application form of the European Certificate of Succession and the obligations of an authority to verify the information therein as well as the content of the European Certificate of Succession - there are a lot of similarities with the procedures that the Estonian notaries must follow already today. With respect to the Estonian legislation the Succession Regulation does not bring that many amendments to the succession procedures conducted in Estonia. According to the Law of Succession Act and Private International Law Act[3] the succession procedures should be settled in the State of the last place of residence of a deceased and the applicable law should be either the law of the State of the last place of residence of the deceased or the one specified in the last will of the deceased. It should be said, that Estonian notaries have been issuing certificates of succession for years on similar grounds and similar content as foreseen by the Succession Regulation and the European Certificate of Succession. Accordingly, notary shall authenticate a succession certificate if sufficient proof is provided concerning the right of a successor and the extent thereof.[4] Hence, the purpose of the certificate would be to demonstrate factual circumstances established within the succession procedures.

Therefore, it would be appropriate to compare the effects of the Estonian certificate of succession with the effects of the European Certificate of succession as set out in the Succession Regulation.[5] The Supreme Court of Estonia has ruled in various cases that the certificate of succession cannot be the basis for the right of succession. The Supreme Court has stated that "According to § 9 point 1 of the Law of Succession Act the basis for succession is law or the testamentary intention of the bequeather expressed in a will or in a succession contract. According to § 130 point 1 of the Law of Succession Act, all rights and obligations of the bequeather transfer to the successor with the acceptance of a succession. … Thus the certificate of succession merely demonstrates the right of succession and it creates the presumption for the existence of the right of succession in the form of a publicly reliable document, which may be contested before court if it does not correspond with

[1] *ibid*

[2] Article 1(2)(l)

[3] §§24-29, English version is available in https://www.riigiteataja.ee/en/eli/513112013009/consolide

[4] § 171 Law of Succession Act, RT I, 29.06.2014, 10, English version is available in https://www.riigiteataja.ee/en/eli/520012015004/consolide

[5] The effects of the European Certificate of Succession are listed in Article 69 of the regulation, as described above.

the factual circumstances. Therefore, the existence or non-existence of the certificate of succession itself does not affect the right of succession nor its extent thereof."[1]

It is also described in the Recital of the Succession Regulation that the Certificate should produce the same effects in all Member States. It should not be an enforceable title in its own right but should have an evidentiary effect and should be presumed to demonstrate accurately elements which have been established under the law applicable to the succession or under any other law applicable to specific elements, such as the substantive validity of dispositions of property upon death.[2]

It is the professional responsibility of the authority issuing the European Certificate of Succession to ensure that the information provided in the Certificate would be accurate. It is the responsibility of that authority to ensure that it really had jurisdiction to take a decision on the succession and that the proceedings were conducted according to the laws of a habitual residence of a deceased or the laws that were indicated in the last will bearing in mind, that otherwise the information provided in the European Succession Certificate would not be correct and it could have serious consequences to the rights of the beneficiaries.

As there are no time limits in the Succession Regulation as to when the beneficiaries may submit an application for the European Certificate of Succession and it could happen years after the procedures have come to an end, and therefore the rules in determining the jurisdiction and applicable law should always be respected. It is clear that the same principles should be followed in any succession case, so that the factual circumstances would be accurate and reliable no matter whether demonstrated on the bases of a national or European Certificate of Succession.

CONCLUSION

The Succession Regulation imposes to the authorities of the Member States several obligations and it seems that the egulation can be effectively applied only if the authorities of Member State are willing to co-operate and exchange information in the matters regulated with the Succession Regulation. It is the obligation of the Member States to ensure that succession procedures are carried out in a manner that accurate information is established in the succession proceedings in a way that it could be reliable in all the Member States.

The aim of the obligation to establish jurisdiction is to ensure that successions are settled only in one Member State by one authority in that Member State and it obliges the authorities to examine whether they have jurisdiction. The question to be asked here is, what could be reasonably expected from the authority when it examines its jurisdiction? For instance, in case there is a last will whereby proceedings could be initiated in a different Member State then the one of habitual residence, then in practice any such examination presupposes in case of a reasonable doubt an inquiry to the Member State of habitual residence, in order to ensure that the court of general jurisdiction has not started with the succession proceedings.

According to the Regulation Member States must inform the European Commission of all the authorities who are dealing with the succession matters which will be published and kept up to date.[3] As the list of authorities is not published yet, it is not possible to analyse it but the Regulation itself does not describe the obligation of a Member State to notify the Commission of such central authority or a register whereby it would be possible to obtain information on whether the proceedings have been commenced. It would not be reasonable that in case of doubt the authority of one Member State or any interested person should make an inquiry for example to all the notaries of another Member State. Any exchange of information to that end could be helpful in practice in order to ensure that succession proceedings are carried out and that the European Certificate of Succession is issued only in one Member State by competent authority. Even if the Member States do not have any such

[1] Point 36 of the 08.02.2006 judgment nr 3-2-1-121-05 as translated by the author, available only in Estonian on http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-121-05. See also point 16 of the 05.11.2008 judgment nr 3-2-1-86-08 available on http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-86-08 and point 16 of the 18.12.2007 judgment 3-2-1-125-07 available on http://www.riigikohus.ee/?id=11&tekst=RK/3-2-1-125-07.

[2] Point 71 of the Recital

[3] Article 78(1)(c) and 79

central source yet, then they still should ensure that the "one succession / one court" principle derived from the Regulation is respected. As the authorities of the Member States are obliged to register European Certificates of Succession and keep a record on persons who have obtained the certified copy of the European Certificate of Succession, the exchange of information between Member States on those aspects could already to some extent contribute to the better application of the regulation.

In order to ensure that the last wishes of a deceased are respected and that the succession proceedings and the European Succession Certificate would reflect accurate information, it would be important that Member States exchange information on the existence of last wills. The Council of Europe's Convention on the Establishment of a Scheme of Registration of Wills, signed in Basel on the 16th of May 1972,[1] provides in its Article 1 that its Contracting States undertake to establish, in accordance with its provisions, a scheme of registration of wills, with a view to facilitating, after the death of the testator, the discovery of the existence of the will.[2] At the time of writing this analysis this convention is in force only in ten Member States of the European Union. Some Member States are willing to exchange information on wills via the platform established by the European Network of Registers of Wills[3] , however, no reference is made to it in the Succession Regulation. In case the court or authority of a member State who has general jurisdiction because the deceased had habitual residence in that Member State, would it be reasonable to expect that before issuing the European Certificate of Succession an inquiry to another Member State, with whom the deceased could have been closely connected, on the existence of a will is made?

The question that could be asked here is, that in case the authority having jurisdiction could reasonably assume that there could be a last will made in another Member States, could that authority be held liable for not issuing European Certificate of Succession with accurate information, because not all the steps were taken that a reasonable person would do in order to establish whether the deceased left a will in another Member State?

The beneficiaries of testate and intestate succession could be completely different and if the property of a deceased is disposed on the bases of the European Certificate of Succession issued the bases of the intestate succession, then the beneficiaries according to the will could suffer damages and financial loss if the will is found after the disposal of property by the beneficiaries shown in non-accurate certificate of succession.

According to the Succession Regulation in examining the application of the European Certificate of Succession, the competent authority of a Member State shall, upon request, provide the issuing authority of another Member State with information held, in particular, in the land registers, the civil status registers and registers recording documents and facts of relevance for the succession or for the matrimonial property regime or an equivalent property regime of the deceased, where that competent authority would be authorised, under national law, to provide another national authority with such information.[4] This provision does not impose an obligation to disclose any information and in case the national laws do not allow the authorities of the Member States to disclose information on wills to the authority of another Member State, they would not do so. That means from one hand that accurate succession proceedings could not be conducted and from another hand that the beneficiaries entitled to obtain the information about wills would still need to travel to another Member State in order to obtain it.

It should be concluded, that the Succession Regulation establishes common grounds for the Member States for dealing with the succession matters and by this the requirements that the beneficiaries are faced to are simplified, but it also leaves some open ends and unanswered questions which would have to be solved by future legislation or the case law of the European Court of Justice.

[1] Available in http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&CM=1&NT=077

[2] Article 1 of the Convention on the Establishment of a Scheme of Registration of Wills

[3] See more on http://www.arert.eu/?lang=en

[4] Article 66(5)

Biography

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