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

Workshop for the JURI Committee

EN 2015
Cross-border activities in the EU
Making life easier for citizens

WORKSHOP FOR THE JURI COMMITTEE
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

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

1  With the support of the Directorate for relations with National Parliaments - Legislative Dialogue Unit
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 Dispositions 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 Pötter LL.M, Legal advisor of the Estonian Chamber of Notaries

11:45 - 12:30 Debate

14:30 - 16:30
SESSION II
CROSS BORDER FAMILIES AND FAMILIES CROSSING-BORDERS

14:30 - 14:40 Opening remarks

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 Ia 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
15:30 - 16:00  Debate

16:00 - 16:10  Name Law - is there a need to legislate?
Prof. Paul Lagarde, Université Paris I (Panthéon-Sorbonne)

16:10 - 16:30  Debate

16:30 - 18:30  SESSION III
BUSINESS AND CONSUMERS' CONCERNS

16:30 - 16:40  Opening remarks on private international law as a regulatory tool for global governance
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 - 17:10  Debate, opened by Lidia Geringer de Oedenberg, MEP, rapporteur for the review of the Small Claims regulation

17:10 - 17:20  Mediation as Alternative Dispute Resolution (the functioning of Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters)
Prof. Giuseppe De Palo ADR Center Srl

17:20 - 17:30  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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17:50 - 18:00  Conclusions
Pavel Svboda, Chair of the Committee on Legal Affairs

18:00  End of the Workshop
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*(Jan von Hein and Giesela Rühl)*

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*(Pierre Callé)*

Promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the EU and beyond
*(Michael P. Clancy)*

Towards European Model Dispositions for Family and Succession Law?
*(Christiane Wendehorst)*

EU Regulation 650/2012 on successions and the creation of a European Certificate of Succession
*(Kurt Lechner)*

Regulation (EU) 650/2012/EU on jurisdiction, applicable law, recognition and enforcement of decisions and execution of authentic instruments in matters of succession and on the creation of a European Certificate of Succession
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The European Small Claims Procedure and the new Commission proposal
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The 2005 Hague Convention on Choice of Court Agreements and the recast of the Brussels I Regulation
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Kurt Lechner
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Eve Pötter
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
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 2.).
- second, to describe possible courses of action to overcome these deficiencies, including a European Code on PIL (infra3.)
- third, to analyse the merits and demerits of possible courses of action, including the adoption of a European Code on PIL (infra 4.)
- fourth, to suggest a course of action that will gradually lead to a more coherent legislative framework for European PIL (infra 5.).
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 2.1.).
- 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 2.2.).
- 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 4.). A comprehensive codification, for example, would yield significant gains with regard to the visibility, accessibility and coherence of European PIL (see infra see infra 4.1.1.). The same is true, albeit to a lesser degree, for sectoral codifications and for the codification of general principles of European PIL (see infra 4.2. and 4.3.).
- However, there are institutional and practical obstacles that cast the actual feasibility of a comprehensive codification of European PIL into doubt (see infra 4.1.2.). The same holds true for the codification of general principles of European PIL (see infra 4.3.). 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 5.).
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 matters4 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 PIL6 – 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 2.1.1.). And even though this number is impressive and the overall quality of the various Regulations is generally considered good,8 the fact that the

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.
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.
8 For generally favourable appreciations of the various regulations, see Bogdan, Introduction, pp. 31 et seqq.; Van Calster, European PIL, pp. 19 et seqq.
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 2.2.1.). 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 practitioners (see infra 2.3.).

- 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 2.2.3.). 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 2.2.2.). 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 2.2.1.).

- Third and finally, scattering functionally interrelated rules across various Regulations may endanger their coherent interpretation and application in practice (see infra 2.2.3.). 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 2.3.). 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. 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 3.2.) or even serve as a blueprint for a comprehensive codification of PIL (see infra 3.1.).

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”. 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

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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 [...]."

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. The results reached by this working group were presented in October 2012. 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. Apart from these requested studies, questions of codifying European PIL – either as a whole or at least with regard to general principles (see infra 3.1. and 3.3.) – have been analyzed by many European scholars. Following a conference on this subject that had been held in Toulouse (France) in March 2011, Paul Lagarde presented a proposal for a codification of selected issues relating to the general part of European PIL. 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. 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 addressed various issues of codification and/or a consistent interpretation of European PIL that are also of relevance to this paper. In addition, the work of the European Group of Private International Law (Groupe Européen de Droit International Privé – GEDIP) must be mentioned, which has, inter alia, recently presented a proposal on dual nationality. Finally, the German Council for Private International Law has elaborated various proposals to fill the gaps in the existing framework of European PIL, e.g. violations of...(continued)
of personality rights, prospectus liability, the effects of an assignment of claims on third parties and international company law.

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 2.), 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 2.1.). By the same token, we analyze the above-mentioned deficiencies of European PIL in more detail (see infra 2.2.).

- In the second and third part (infra 3. and 4.), we describe, analyse and evaluate possible courses of action, ranging from (1) a comprehensive codification of European PIL (see infra 3.1. and 4.1.) to (2) a further, more closely integrated codification of various sectors (see infra 3.2. and 4.2.) to (3) a codification of general principles of European PIL (see infra 3.3. and 4.3.).

- In the fourth part (infra 5.), 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 5.).

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23 See the proposal for a new Art. 4a Rome II developed by Junker, RIW 2010, 257, 259.
24 Resolution of the German Council for Private International Law, Special Committee on Financial Market Law, IPRax 2012, 471.
25 German Council for Private International Law, Special Committee, IPRax 2012, 371.
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 2.1.), the second section to the perceived deficiencies of the pertaining rules and regulations (infra 2.2.).

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.

2.1.1. 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,27 the Rome II Regulation devoted to the law applicable to non-contractual obligations,28 and the so-called Rome III Regulation determining the law applicable to divorce and legal separation.29 The most well-known and arguably most important Regulations of the second type are the Brussels Regulation, recently recast as the Brussels Ibis Regulation and applicable since 10 January 2015, and the Brussels IIbis Regulation. The Brussels Ibis Regulation focuses on jurisdiction, recognition and enforcement of foreign judgements in civil and commercial matters,30 the Brussels IIbis Regulation deals with jurisdiction, recognition and enforcement in matrimonial matters and matters of parental responsibility.31 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,32 the Regulation on the European Order for Payment,33 the Small Claims Regulation,34 the Regulation on the European Account Preservation Order35 and the new Regulation on Mutual Recognition of Protection Measures in Civil Matters.36 In addition, matters of 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.\(^{37}\)

Regulations of the third type are the Insolvency Regulation\(^{38}\) and the Succession Regulation.\(^{39}\) In addition, the two – still pending – proposals on matrimonial property\(^{40}\) and the property consequences of registered partnerships\(^{41}\) 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.\(^{42}\) 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\(^{43}\) 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 Ibis Regulation in a coherent and harmonious manner (see Recitals 7, 15, 17 and 24 Rome I, Recital 7 Rome II).\(^{44}\) Yet the precise reach of these recitals is hard to define (see infra 2.2.3.). 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.\(^{45}\)

2.1.2. 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.\(^{46}\) Naturally, in the light of Art. 3(4) and 6(2) Rome I it is open to debate whether such rules are still necessary.\(^{47}\)


\(^{39}\) Supra fn. 9.


\(^{44}\) Pursuant to Art. 80 2nd sentence Brussels Ibis, references to the former Brussels I Regulation must be read as references to the recast version.


enacted Consumer Rights Directive\(^{48}\) has answered this question in the negative: it contains no specific choice-of-law rule along the above mentioned lines, but rather refers to the protection granted to the consumer under the Rome I Regulation in Recital 58.

### 2.1.3. 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).\(^{49}\) 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.\(^{50}\) 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.\(^{51}\)

### 2.1.4. 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 supra2.1.1.). By means of the revised Lugano Convention of 2007,\(^{52}\) the former Brussels I Regulation has been extended to some of the EFTA states (Switzerland, Norway and Iceland).\(^{53}\) 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.\(^{54}\) 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 2.2.1.4.).

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49 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.


2.2. 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.

2.2.1. 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, which need not be reproduced here. Generally, four distinct types of gaps may be distinguished.

2.2.1.1. 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, and specific choice-of-law rules relating to takeovers in the pertinent directive, all 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 2.1.3.). 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 2.1.3.), clear-cut European choice-of-law rules are still lacking.

2.2.1.2. 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 2.1.1.). 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 Ibis Regulation. According to Art. 25(1) sentence Brussels Ibis, 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. Yet, Recital 20 of the Brussels Ibis 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

58 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.
59 “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 Ibis.
virtue of Art. 1(2)(g). Despite efforts by the European Parliament to amend the Regulation, a choice-of-law rule on these matters is still lacking. In contrast, they are covered by the Brussels Ibis Regulation. It follows that as regards the violation of personality rights there is considerable room left for forum shopping and so-called “libel tourism”.

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.
- 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.
- 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.

2.2.1.3. General Principles of PIL

The third type of gap relates to the general principles of PIL. 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 Iibis), 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. In contrast, there is no express provision to be found in the Brussels Iibis and the Rome III Regulation. With regard to Art. 3(1)(b) Brussels Iibis, the ECJ endorsed the approach of the Succession Regulation. 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. 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

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61 On the proposal made by the German Council for PIL, see supra 1.
63 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.
64 See Caliess/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).
68 MüKo/von Hein Art. 5 EGBGB para. 73, with further references.
70 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.
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.71

Other gaps relating to general principles of PIL concern incidental questions.72 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.73

2.2.1.4. 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.74 In addition, European law-makers decided to restrict the Brussels IIbis Regulation to matters of international civil procedure and to leave intact the choice-of-law regime of the Hague Child Protection Convention.75 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.76 It should not be overlooked, however, that the combination of EU rules on procedural issues and Hague rules on choice of law also causes difficulties.77 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 IIbis.78

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 Convention79 and the Hague Product Liability Convention,80 have a sizeable number of non-EU members, the latter exception is of little practical significance.81

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71 See German Federal Court of Justice (Bundesgerichtshof), 19 February 2014 – XII ZB 180/12, NJW 2014, 1383.
73 See MüKo/von Hein Einl. IPR para. 188, with further references.
78 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.
2.2.2. 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 2.1.2.), 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 2.1.2.).

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) 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.

2.2.3. 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 2.2.3.). Other inconsistencies relate to the rules on renvoi: whereas the Rome I, Rome II, and Rome III Regulations exclude any form of renvoi, (at least in principle), 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 Ibis 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 2.2.1.2.). 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.

Further discrepancies exist as regards the treatment of multi-unit states: 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 2.2.1.2.). In addition, the wording of the two provisions diverge, notably as regards the requirements of an implied choice of law. Finally, both Regulations take different approaches regarding the protection of weaker parties, notably consumers, from the dangers of a free choice of law. 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 Ibis). 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. 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. Nonetheless, the ECJ decided that “Article 15(1)(c) [Brussels I] must be interpreted as meaning 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.” While this line of reasoning is debatable, it should be noted that the goal of consistency between Brussels Ibis 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).

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89 This had been the clearly prevailing view before Emrek, see Kropholler/von Hein, EuZPR, Art. 15 EuGVO para. 26, with further references.
90 ECJ, 17 October 2013, Case C-218/12 Emrek v. Sabranovic, IPRax 2014, 63.
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 2.2.1.), others are regulated again and again in different contexts (see supra 2.2.2.), while again others are regulated in different and arguably inconsistent ways (see supra 2.2.3.). 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. 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 1.) 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.92 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,93 this does not mean that other supporting measures may not help to improve the situation (cf. infra 5.3.). 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”,94 an idea that has received considerable attention and support (see supra 1.).95 The following section sheds light on the possible meanings of “codification” as well as possible contents of a “European Code on PIL”.

3.1.1. 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.96 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 codification is very often used to describe something that might better be termed compilation.97 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”.98 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.

93 This view is shared, for example, by Wilke, in: Leible/Unberath (eds.), Rom 0-Verordnung, 2013, p. 23, 25.
98 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.”
3.1.2. 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. 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. The first form, i.e. a combined codification of choice of law and international civil procedure, is to be found, for example, in Belgium, the Czech Republic, Hungary, Italy, Slovenia and Switzerland. It is also the form the European legislature has more recently applied in the field of family and succession law (see supra 2.1.3.). The second form, a separate codification for choice of law and international civil procedure respectively is currently to be found, for example, in Austria, Estonia, Germany, and Poland. 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 Ibis Regulations (see supra at 2.1.1.). 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 Ibis 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, while others seem to argue for two separate codifications.

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 (more) sectoral codifications that are limited in their scope to specific areas. 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, …”. And in its communication of March 2014, the Commission suggests that “initiatives to complement existing justice policies and legal

112 See, for example, Adolphsen, in: FS Kaisiss, 2012, pp. 1 et seqq.
113 See, for example, Basedow, in: von Hein/Rühl (eds.), Kohärenz, 2015 (forthcoming); Kramer, European PIL: The Way Forward, 2014, at No. 5.4.1.
instruments may ... have to be envisaged where appropriate.” 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.

The design of sectoral codifications may vary depending on how the limits of a certain legal “sector” or “area” are defined (see supra 2.1.1.). 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 Ibis and the Brussels IIbis Regulations (see supra 2.1.1.). 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 2.1.1.). 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, 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”. Occasionally, however, it is also argued that a general part should cover both aspects of choice of law and international civil procedure. 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. This is true, for example, for the “Embryon de règlement d’un Code 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.

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115 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.

116 See, for example, Kramer, European PIL: The Way Forward, 2014, at No. 5.4.1.


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

120 See, for example, Corneloup/Nourissat, in: Fallon/Lagarde/Poilót-Peruzzetto (eds.), Quelle architecture, 2011, p. 257, 263 et seqq.
On the European level, the idea of codifying general principles has not attracted very much attention or interest up to date. 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”. Whether the codification of general principles would actually be attractive for national and European policy-makers is clearly a separate question.

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.
4. POSSIBLE WAYS FORWARD: ASSESSMENT

In the two preceding parts we have described the perceived deficiencies of European PIL (see supra 2.) as well as various courses of action that are currently under discussion (see supra 3.). 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 4.1.) and then move on to discuss the respective merits and demerits of (more) sectoral codifications on the one hand (infra 4.2.) and codification of general principles on the other (infra 4.3.).

4.1. Comprehensive Codification

As pointed out earlier (see supra 3.1.) 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 4.1.1.). 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 4.1.2.).

4.1.1. Advantages

In 2013 the European Added Value Unit published a report on the economic benefits of having a European Code on PIL (see supra 1.). 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. However, this does not mean that a comprehensive Code would not have substantial advantages.

4.1.1.1. Visibility

The first potential advantage of a comprehensive European Code on PIL would arguably be its visibility. 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 and influenced, for example, national codifications in Romania, Slovenia, Belgium, Bulgaria, and the Czech Republic. Very frequently, 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

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123 MüKo/von Hein Art. 3 EGBGB para. 70.
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to resort to national approaches. 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.

4.1.1.2. 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 2.1.), 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. 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." 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.

On the other hand, creating a single comprehensive code might also have some drawbacks concerning the accessibility of European PIL. 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. 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. 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 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. 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

132 Basedow, RabelsZ 75 (2011) 671.
134 See also the Communicaton from the European Commission, supra fn. 122, COM(2014) 144 final.
136 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.”
137 Kieninger, in: FS von Hoffmann, 2011, p. 184, 196 et seq.
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.

4.1.1.3. 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 3.1.1.), 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 3.1.2.).

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. 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). 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. Such an approach obscures the supranational origin of the pertinent rules, thereby creating potential obstacles to their uniform application in practice. In addition, not all EU Member States are contracting parties to the same international conventions.

4.1.1.4. 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 2.2.2. and 2.2.3.). 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. 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 2.2.3.). Finally, a comprehensive Code could also lead to

141 See Kieninger, in: FS von Hoffmann, 2011, p. 184, 192.
142 Wagner, Neth. Int. L. Rev. 61 (2014) 225, 232 et seq.
143 Wagner, Neth. Int. L. Rev. 61 (2014) 225, 232 et seq.
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.\textsuperscript{145} 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 \textit{Emrek} judgment (see supra 2.2.3.).

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 \textit{renvoi}.\textsuperscript{146} 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 \textit{Pantherwerke} decision,\textsuperscript{147} 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.\textsuperscript{148} 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.\textsuperscript{149} Finally, a further alignment between the Brussels \textit{Ibis} and the Rome I and II Regulations by way of consistent interpretation could have the – arguably adverse – side-effect of creating divergences between Brussels \textit{Ibis} and the Lugano Convention of 2007. A European Code on PIL would have to keep these trade-offs in mind.\textsuperscript{150}

\subsection*{4.1.2. 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.

\subsubsection*{4.1.2.1. 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.\textsuperscript{151} 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

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\begin{enumerate}
\item \textsuperscript{145} \textit{Meeusen}, in: Liber Amicorum Erauw, 2014, p. 139, 150.
\item \textsuperscript{146} See \textit{von Hein}, in: Leible/Unberath (eds.), Rom 0-Verordnung, p. 341, 363.
\item \textsuperscript{147} ECJ, 16 January 2014, Case C-45/13 Andreas Kainz v. Pantherwerke AG, ECLI:EU:C:2014:7, at paras. 23 et seqq.
\item \textsuperscript{148} See, on Recital No. 7 Rome II, \textit{von Hein}, RabelsZ 73 (2009) 461, 470 et seq.
\item \textsuperscript{149} \textit{von Hein}, RabelsZ 73 (2009) 461, 470.
\item \textsuperscript{150} Cf. also \textit{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”).
\item \textsuperscript{151} Cf., in the context of a Rome 0 Regulation, \textit{Wagner}, Neth. Int. L. Rev. 61 (2014) 225, 233–236; see also MüKo/\textit{von Hein} Art. 3 EGBGB para. 73.
\end{enumerate}
\end{footnotesize}
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.\(^\text{152}\) Difficulties, however, would arise as far as the general part of a European Code on PIL is concerned:\(^\text{153}\) 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.\(^\text{154}\) 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.\(^\text{155}\)

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.\(^\text{156}\) So far, Denmark does not directly participate in measures taken under Art. 81 TFEU,\(^\text{157}\) whereas the UK and Ireland participate on a case-by-case basis only.\(^\text{158}\) 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.\(^\text{159}\) 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 Ibis Regulation,\(^\text{160}\) the Maintenance Regulation\(^\text{161}\) and the Service Regulation,\(^\text{162}\) 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,\(^\text{163}\) 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.\(^\text{164}\) 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.

\(^{152}\) Cf., in the context of Rome 0, Wagner, Neth. Int. L. Rev. 61 (2014) 225, 233 et seq.

\(^{153}\) Cf., in the context of Rome 0, Wagner, Neth. Int. L. Rev. 61 (2014) 225, 234 et seq.

\(^{154}\) Cf., in the context of Rome 0, Wagner, Neth. Int. L. Rev. 61 (2014) 225, 234 et seq.

\(^{155}\) Cf., in the context of Rome 0, Wagner, Neth. Int. L. Rev. 61 (2014) 225, 234 et seq.

\(^{156}\) Cf., in the context of Rome 0, Wagner, Neth. Int. L. Rev. 61 (2014) 225, 235 et seq.

\(^{157}\) Art. 1 of the Protocol no. 22 on the position of Denmark, annexed to the TFEU.

\(^{158}\) 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.

\(^{159}\) 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.


\(^{162}\) 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.


\(^{164}\) Cf., in the context of Rome 0, Wagner, Neth. Int. L. Rev. 61 (2014) 225, 235 et seq.
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.\textsuperscript{165} As such it is – or, in the case of Greece, will soon be – in force in sixteen Member States.\textsuperscript{166} 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 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.\textsuperscript{167} 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 \textit{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.\textsuperscript{168}

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.

\textbf{4.1.2.2. 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 1.). 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\textsuperscript{169} 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 5.3.3.). 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 2.1.1.). 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

\textsuperscript{165} On enhanced cooperation in European PIL, see MüKo/von Hein Art. 3 EGBGB paras. 51–54.


\textsuperscript{167} \textit{Kramer et al.}, A European Framework for PIL, 2012, pp. 90 et seq.

\textsuperscript{168} "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.
One has to doubt whether starting work on a comprehensive Code would be conducive to reaching a political consensus on sensitive issues. 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 3.1.1.).

4.1.3. 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 4.1.2.). 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 4.1.2.). To be sure, this does not rule out the possibility of having a single legal instrument on PIL in the long run (see infra 5. 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 5.2.) and to improve the existing institutional framework (see infra 5.3.).

4.2. Sectoral Codifications

As pointed out earlier (see supra 3.2.) 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 4.1.1.), 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 4.1.2.). 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 Ibis and Rome III, for example, would be difficult to realize because of the institutional concerns that have already been discussed (see supra 4.1.2.1.). Although a better integration of EU regulations on procedural issues – such as Brussels Ibis – 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 2.2.3.), 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 4.1.1.4.). Moreover, codifying functionally similar rules, e.g. on recognition and enforcement of foreign judgments, separately for each

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legal area may increase the number of redundancies and incoherences already described (see supra 2.2.2. and 2.2.3.).

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 3.3.) 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 2.2.2.). Moreover, it could be used as a tool to eliminate inconsistencies between the various regulations (see supra 2.2.3.).

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 4.1.2.1.). 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. 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 position of the Member States concerned. 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.

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173 See Leible/Müller, YbPIL 14 (2012/13) 137, 142–150; Wagner, Neth. Int. L. Rev. 61 (2014) 225, 227 et seq.
175 Leible/Müller, YbPIL 14 (2012/13) 137, 141 et seq.; Wilke, GPR 2012, 334, 339 et seq.
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. 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. 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 1.) and elsewhere 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.

5.1.1. 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 2.2.1.), 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. 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. 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 – and to implement a European Parliament Resolution of 2012 –, the Commission has released a call for tenders relating to a study on the law applicable to companies (see supra 3.2.). 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.

178 See also Meeusen, in: Liber Amicorum Erauw, 2014, p. 139, 144, advocating “the (gradual) establishment of a coherent set of private international law rules”.
182 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).
5.1.2. Family and Succession Matters

In family and succession matters the situation is more difficult. As outlined elsewhere\textsuperscript{184} 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,\textsuperscript{185} 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,\textsuperscript{186} 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.\textsuperscript{187} 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 2.2.1.4.) both aspects are to a large extent covered by two successful Hague Conventions which should not be duplicated on the European level.

5.1.3. 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.\textsuperscript{188} It is self-evident that these differences significantly undermine the effectiveness of European PIL in practice.\textsuperscript{189}

\textsuperscript{184} Kramer et al., A European Framework for PIL, 2012, at No. 1.7.3.


\textsuperscript{187} 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.


We, therefore, endorse ongoing (international and European) efforts to provide for uniform rules relating to the determination and application of foreign law, 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. 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.

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.

5.2.1. 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. 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. 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. Since both the UK and Ireland have opted into the Rome II Regulation (see supra 4.1.2.1.), 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

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190 See, for example, Esplugues Mota, YbPIL 13 (2011) 273.
192 MüKo/von Hein Art. 3 EGBGB paras. 69 et seqq.
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 2.2.3.), 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 2.2.2.) and thereby promote transparency. Third, in conjunction with the gap-filling 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.

5.2.2. 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 5.1.2.). 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 2.2.2. and 2.2.3.). 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 5.2.1.). 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 IIbis 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 IIbis 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 4.1.2.1.). 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 3.), 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.

5.3.1. 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.\(^{195}\) Both bodies provide extremely valuable advice on legislative matters in the field of PIL and have made numerous influential reform proposals (see supra 1.). 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 4.1.2.2.) 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.\(^{196}\)

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\(^{195}\) 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 seq.

\(^{196}\) 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.
5.3.2. 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.

5.3.2.1. 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.\(^{197}\) 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 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.\(^{198}\) 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.).

5.3.2.2. 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,\(^{199}\) particularly in the field of international adoptions and measures concerning the protection of children and vulnerable adults.\(^{200}\) 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

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197 See Rösler, 2012, pp. 420 et seq.
198 Rösler, 2012, pp. 420 et seq.
199 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.
200 MüKo/von Hein Art. 3 EGBGB para. 314.
the opportunity to answer this question in the context of the Maintenance Regulation.\textsuperscript{201} 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."\textsuperscript{202} 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."\textsuperscript{203} 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.

5.3.3. 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 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 4.1.2.2.) 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/\textit{Ibis}, Brussels II\textit{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.

5.3.4. 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 5.1.3.), 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.\textsuperscript{204} This procedure would – as with the preliminary reference procedure to the ECJ – allow Member States to directly

\textsuperscript{201} ECJ, 18 December 2014, Case C–400/12 and C-408/13 Sanders v. Verhaegen and Huber v. Huber, ECLI:EU:C:2014:2461.
\textsuperscript{202} ECJ, Case C–400/12 and C-408/13 (fn. 201), at para. 45.
\textsuperscript{203} ECJ, Case C-400/12 and C-408/13 (fn. 201), at para. 47.
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 1968,²⁰⁵ by establishing a direct link to the very court that knows the applicable law better than any other institution.

5.3.5. 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.²⁰⁶ 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.

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 2.1.). 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 2.2.1.), redundancies (2.2.2.), and incoherences (supra 2.2.3.). 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 3.1.), to merely sectoral codifications (see supra 3.2.), and to the codification of general principles (supra 3.3.). We have argued that each of these courses of action has a number of advantages (see supra 4.). A comprehensive codification, for example, would significantly improve the visibility, accessibility and coherence of European PIL (see supra 4.1.1.). 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 4.2. und 4.3.). 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 5.). 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 5.1.). 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 5.2.) and to improve the institutional framework of the pertaining rules and regulations on the other (see supra 5.3.). 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 5.3.1.), to more specialization of courts at the EU and at the Member States level (see infra 5.3.2.2.), to the introduction of a preliminary reference procedure between Member States’ Courts (see supra 5.3.4.), to the creation of a European database for cases relating to PIL (see supra 5.3.3.) and, finally, more targeted legal education and training of judges (see supra 5.3.5.). 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.
REFERENCES


- Stefania Bariatti, Multiple Nationalities and EU Private International Law, Yearbook of Private International Law (YbPIL) 13 (2011) 1


- Jürgen Basedow, Le rattachement à la nationalité et les conflits de nationalité en droit de l’Union Européenne, Revue critique de droit international privé (Rev. crit. dr. int. pr.) 2010, 427


- Michael Bogdan, Concise Introduction to EU Private International Law, 2nd ed. 2012


- Sabine Corneloup and Cyril Nourissat, Quelle structure pour un code européen de droit international privé, in: Marc Fallon, Paul Lagarde and Sylvaine Poillot-Peruzzetto (eds.), Quelle architecture pour un code européen de droit international privé, 2011, p. 257

- Elizabeth B. Crawford and Janeen M. Carruthers, Connection and coherence between and among European instruments in the Private International Law of Obligations, International and Comparative Law Quarterly (Int. Comp. L. Q.) 63 (2014) 1

• Florian Eichel, Interlokale und interpersonal Anknüpfungen, in: Stefan Leible and Hannes Unberath (eds.), Brauchen wir eine Rom 0-Verordnung?, 2013, p. 397
• Marc Fallon, Patrick Kinsch and Christian Kohler (eds.), Le droit international privé européen en construction, 2011
• Marc Fallon, Paul Lagarde and Sylvaine Poillot-Peruzetto (eds.), Quelle architecture pour un code europeen de droit international privé?, 2011
• Trevor C. Hartley, Libel Tourism and conflict of laws, International Comparative Law Quaterly (Int. Comp. L. Q.) 59 (2010) 25
• Trevor C. Hartley, Presentation of GEDIP, in: Marc Fallon, Patrick Kinsch and Christian Kohler (eds.), Le droit international privé européen en construction, 2011, p. 9
• Jan von Hein, Der Renvoi im europäischen Kollisionsrecht, in: Stefan Leible and Hannes Unberath (eds.), Brauchen wir eine Rom 0-Verordnung?, 2013, p. 341
• Jan von Hein and Giesela Rühl (eds.), Kohärenz im Internationalen Privat- und Verfahrensrecht der Europäischen Union, 2015 (forthcoming)


• **Abbo Junker**, Der Reformbedarf im Internationalen Deliktsrecht der Rom II-Verordnung drei Jahre nach ihrer Verabschiedung, *Recht der internationalen Wirtschaft (RIW)* 2010, 257


• **Eva-Maria Kieninger** and **Oliver Remien** (eds.), Europäische Kollisionsrechtsvereinheitlichung, 2012


• Jan Kropholler and Jan von Hein, Europäisches Zivilprozessrecht (EuZPR), 9th ed. 2011

• Thalia Kruger and Jinske Verhellen, Dual Nationality = Double Trouble?, Journal of Private International Law (J. Priv. Int. L.) 7 (2011) 601


• Paul Lagarde, Embryon de Règlement portant Code européen de droit international privé, Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 75 (2011) 673


• Stefan Leible (ed.), General Principles of European Private International Law, 2015 (forthcoming)

• Stefan Leible and Michael Müller, A general part for European PIL? The idea of a “Rome 0 Regulation”, Yearbook of Private International Law (YbPIL) 2012/2013, 137

• Stefan Leible and Hannes Unberath (eds.), Brauchen wir eine Rom 0-Verordnung? 2013


• Aude MacEleavy Fiorini, Qu’y a-t-il en un nom? Un vrai code pour le droit international privé européen, in: Marc Fallon, Paul Lagarde and Sylvaine Poillot-Peruzzetto (eds.), Quelle architecture pour un code européen de droit international privé, 2011, p. 27


- Timo Nehne, Methodik und allgemeine Lehren des europäischen Internationalen Privatrechts, 2012


- Giesela Rühl, Statut und Effizienz. Ökonomische Grundlagen des Internationalen Privatrechts, 2011


- Giesela Rühl, Der Schutz des Schwächeren im europäischen Kollisionsrecht, Herbert Kronke and Karsten Thorn (eds), Grenzen überwinden – Prinzipien bewahren. Festschrift für Bernd von Hoffmann, 2011, 364


- Tilman Schultheiß, Anmerkung zur Entscheidung des EuGH vom 17.10.2013 (C-218/12; EuZW 2013, 943) - Zur Frage des Kausalzusammenhangs zwischen der Ausrichtung der Gewerbetätigkeit und dem Ort des Vertragsschlusses, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2013, 944


• Hans Jürgen Sonnenberger (ed.), Vorschläge und Berichte zur Reform des europäischen und deutschen internationalen Gesellschaftsrechts, 2007


• Hans Jürgen Sonnenberger, Grenzen der Verweisung durch europäisches internationales Privatrecht, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2011, 325

• Hans Jürgen Sonnenberger, German Council for Private International Law – Special Committee: “Third-party effects of assignment of claims”, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 2012, 371


• Hans Jürgen Sonnenberger, Etat de droit, construction européenne et droit des sociétés (1), *Revue critique de droit international privé (Rev. crit. dr. int. pr.)* 102 (2013) 101


• Ansgar Staudinger, Anmerkung zum Urteil des EuGH vom 17.10.2013 (C-218/12, DAR 2013, 695) - Zur Kausalität zwischen Ausrichtung der Tätigkeit und Vertragsschluss, *Deutsches Autorecht (DAR)* 2013, 697


• Symeon C. Symeonides, Codifying Choice of Law around the World, 2014

• Geert Van Calster, European Private International Law, 2013.


• Rolf Wagner, Das Vermittlungsverfahren zur Rom II-VO, in: Dietmar Baetge, Jan von Hein and Michael von Hinden (eds.), Die richtige Ordnung, Festschrift für Jan Kropholler zum 70. Geburtstag, 2008, 715

• Rolf Wagner, Das rechtspolitische Umfeld für eine Rom 0-Verordnung, in: Stefan Leible and Hannes Unberath (eds.), Brauchen wir eine Rom 0-Verordnung?, 2013, p. 51

• Rolf Wagner, Do we need a Rome 0 Regulation?, *Netherlands International Law Review (Neth. Int. L. Rev.)* 61 (2014) 225

• Felix M. Wilke, Brauchen wir eine Rom 0-Verordnung?, *Zeitschrift für das Privatrecht der Europäischen Union (GPR)* 2012, 334
Cross-border activities in the EU - Making life easier for citizens


- 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, *Yearbook of Private International Law (YbPIL)* 15 (2013/2014) 31


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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.
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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 closely¹. 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. 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. 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

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2 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.
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).3

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 Convention4.

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.’


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 Succession8.

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 Latvia9. 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

3 Opinion of the European Economic and Social Committee, op. cit. footnote 1.
4 Article 3(5) of the proposal.
5 Art. 3, § 5, de la proposition.
6 No legalisation or other similar formality shall be required in respect of the documents referred to in Articles 37, 38 and 45 in respect of a document appointing a representative ad litem.
7 No legalisation or other similar formalit y shall be required in the context of this Regulation.
8 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.
9 Cyprus has ratified the Convention, but has not accepted provisional application.
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 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 officers10.

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 records11,
- ICCS Convention No 16 signed in Vienna on 8 September 1976 on the issue of multilingual extracts from civil status records12 and,
- ICCS Convention No 17 signed in Athens on 15 September 1977 on the exemption from legalisation of certain records and documents13.

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10 Article 3: ‘Each Contracting Party shall exempt from legalisation documents to which this Convention applies’.

11 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’.

12 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.

13 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’.
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, 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 morcelé. 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\(^\text{14}\), 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 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.

15 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.
2. THE SIMPLIFICATION OF THE USE OF COPIES AND TRANSLATIONS OF PUBLIC DOCUMENTS

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.

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. DEVELOPMENT OF MULTILINGUAL FORMS

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. These forms are provided in Annexes I to V of the proposal. Electronic versions of these multilingual forms will also be created. 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.

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. The question of which authorities will issue the forms falls under the national law of each Member State. It is simply provided 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.

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16 Article 11.
17 Article 14.
18 Article 5.
19 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 century1. In the Byzantine Empire the Bulle d’Or of Alexus Comnenus I granted to bishops the cognizance of matrimonial causes in 10862. 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 law3. 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 estate4.

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 him5. 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

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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
their degrees in Paris, Orleans or Bologna or other universities where both civil and canon law were taught⁶.

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

 Particularly in relation to matrimonial cases, both the Sacra Romana Rota and the Sacra Penitentiaria Romana heard cases from all over Europe⁷. Protocol books of Scottish notaries display much of the documentation relating to stages of procedure in the sacred penitentiary⁸. 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 penitentiary⁹. 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 courts¹⁰. 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 ducats¹¹. 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 consistory¹².

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 baptised¹³. 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 1855¹⁴. 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 1837¹⁵.

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⁶ DER Watt ‘Scottish Masters and Students at Paris in the 14th Century’ (1955) 36 Aberdeen University Review
⁷ J.J. Robertson, Canon Law as a source, Stair Tercentenary Studies (Stair Society, 1981)
⁸ Protocol book of Cuthbert Simon, Scottish Record Society
⁹ St Andrews Formulare (Stair Society) No. 100
¹⁰ Acts of the Parliaments of Scotland (APS) 1493 c7
¹¹ Formularium Notarium Rotue (Glasgow University spec coll) fo.267
¹² Registrum secreti sigilli regum Scotorum pg 244
¹³ Council of Trent (1563) Session 24
¹⁴ Registration of Births, Deaths and Marriages (Scotland) Act 1854 (17 & 18 Vict. C.80)
¹⁵ Births and Deaths Registration Act 1837 (7 Will.4 & 1 Vict. C.22)
Prior to that, parish registers of baptisms, marriages and burials were kept by local parish churches\textsuperscript{16}.

The current Scottish law on basic public status documents is contained in the Registration of Births, Deaths and Marriages (Scotland) Act 1965\textsuperscript{17} and the Marriages Act 1977\textsuperscript{18}. Registration of births and deaths is governed by the Births and Deaths Registration Act 1953 for England and Wales\textsuperscript{19} and the Marriage Act 1949 covers the registration of marriages in that jurisdiction\textsuperscript{20}.

\subsection{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\textsuperscript{21}.

The Law Merchant was essentially a customary law which applied to commercial matters and merchants trading at Fairs and in Ports in medieval times\textsuperscript{22}. It emphasised the independence of Merchants and their rules governing commercial matters from the Civil law and the law of emerging states\textsuperscript{23}. 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"\textsuperscript{24}. 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\textsuperscript{25}.

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\textsuperscript{26}.

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\textsuperscript{27}. In \textit{Customary Law, Credibility, Contracting and Credit in the High Middle Ages}, Bruce Benson\textsuperscript{28} 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\textsuperscript{29}. Further evidence of non-simultaneous inter-group trade, credit and contracting comes from the Genoa and Marseilles notary records concerning the Champagne Fairs\textsuperscript{30}. These fairs were amongst the most significant in

\begin{itemize}
\item \textsuperscript{16} \url{www.nationalarchives.gov.uk}
\item \textsuperscript{17} Registration of Births, Deaths and Marriages (Scotland) Act 1965 c49
\item \textsuperscript{18} Marriage (Scotland) Act 1977 c.15
\item \textsuperscript{19} Births and Deaths Registration Act 1953 c.20
\item \textsuperscript{20} Marriage Act 1949 c.76
\item \textsuperscript{21} From the Medieval Law Merchant to E-Merchant Law, L. Trakman, \textit{University of Toronto Law Journal}, Vol. LIII, Number 3
\item \textsuperscript{22} Trakman op cit.
\item \textsuperscript{23} Trakman op cit
\item \textsuperscript{24} Trakman op cit, G Mayles. Consuetudo vel Lex Mercatoria or the Ancient Law Merchant, London 1622
\item \textsuperscript{25} William Welwood, Abridgement of all Sea Lawes (1613)
\item \textsuperscript{26} 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).
\item \textsuperscript{27} Trakman, op. cit
\item \textsuperscript{28} Benson, op. cit, 12
\item \textsuperscript{29} Benson, op. cit, 13
\item \textsuperscript{30} Benson, op. cit, 19
\end{itemize}
medieval Europe. They were strictly regulated in terms of locality, type of merchandise traded, when trading could take place and how accounting should happen\textsuperscript{31}. 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, Placenza, 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\textsuperscript{32}. The notes were negotiable throughout Europe. Trading on credit was the norm before the end of the Middle Ages\textsuperscript{33}.

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\textsuperscript{34}.

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 courts to dispense justice at Fairs. These were known as the courts of Piepoudre or Pie Powder\textsuperscript{35}. 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\textsuperscript{36}.

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\textsuperscript{37}.

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.

\textsuperscript{31} Benson, op. cit, 19
\textsuperscript{32} Benson, op. cit, 20
\textsuperscript{33} Benson, op. cit, 20
\textsuperscript{34} Benson, op. cit, 22
\textsuperscript{35} Benson, op. cit, 28
\textsuperscript{36} Benson, op. cit, 29
\textsuperscript{37} Arbitration (Scotland) Act 2010 asp1
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\(^\text{38}\). When such extracts or exemplifications are receivable in that court, they will be receivable in Scotland\(^\text{39}\). 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\(^\text{40}\).

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”\(^\text{41}\).

The Apostille Convention replaced the expensive and problematic formalities of full legalisation by the issue of an Apostille Certificate\(^\text{42}\). 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\(^\text{43}\) of the Convention:

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\(^\text{44}\).

\(^{38}\) 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

\(^{39}\) Anton, 27.99

\(^{40}\) Anton, 27.99

\(^{41}\) Anton 27.101

\(^{42}\) Hague Convention of 5 October 1961 abolishing the requirement of legalisation for foreign and public documents, Article 2.

\(^{43}\) Hague Convention Article 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. 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. 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. 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.

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

EU Regulation No. 1024/2012 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. The Commission decision of 2 October 2009 (2009/739/EC) set out the arrangements for exchange of information by electronic means between Member States under Directive 2006/123/EC 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” are also relevant for understanding the policy context.

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. The regulation established IMI formally and set out rules for its use including the processing of personal data between

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45 www.hcch.net/index_en.php?act=text.display&tid=37
46 Hague Convention, Article 5
47 Hague Convention, Article 5
48 The 1963 Act and relevant Orders
50 2008/49/EC concerning the implementation of the Internal Market Information system (IMI) as regards the protection of personal data
53 Regulation EU No. 1024/2012 recital (5)
54 Regulation EU No. 1024/2012 recital (1)
Cross-border activities in the EU - Making life easier for citizens

Competent authorities of Member States and between competent authorities of the member states and the Commission. 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). 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. 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.

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.

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55 Regulation EU No. 1024/2012 Chapter III – Processing of Personal Data and Security
56 Regulation EU No. 1024/2012 art. 3.1
57 In the UK the IMI Co-ordinator is based at the UK Department for Business, Innovation and Skills
58 http://www.ec.europa.eu/imi-net
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.

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 and Article 10(1) of Regulation (EC No. 45/2001).

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 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

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59 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.

60 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.
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\(^{61}\). Statistics show that at the moment IMI is not used particularly extensively\(^{62}\). 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.

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.

\(^{61}\) COM(2013) 228 Article 7

\(^{62}\) EU SIngle Market Information Sheet ec.europa.eu/internalmarket/imi-net/statistics/index_en.htm
2. TREATY AND LEGAL BASIS

When adopting the proposal for the Regulation\textsuperscript{63} the European Commission applied Article \textsuperscript{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 \textsuperscript{21(1)} and (2), the Commission combined the legal basis with Article \textsuperscript{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\textsuperscript{64}. 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\textsuperscript{65}. Moreover, the Stockholm Programme\textsuperscript{66}, 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\textsuperscript{67} 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"\textsuperscript{68} 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 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


\textsuperscript{64} 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.


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\(^{69}\) 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.

The Commission's proposal has been examined extensively in the Council's Working Party on Civil Law since its publication in April 2013. 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; (d1) 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 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 one’s 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.
Cross-border activities in the EU - Making life easier for citizens

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.

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.

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**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.
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. As a second step, European model agreements on substantive family law issues could be developed, which would ideally be made enforceable in all (participating) Member States of the EU.
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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.
Generally speaking, European model agreements on substantive family law issues would greatly benefit transnational families in the EU. They would ideally be taken up by the European legislator and made enforceable in all (participating) Member States of the EU. In any case, they would serve as a useful tool for parties and their legal advisers, together with information about what is enforceable in which Member State, and could be made available on the European e-Justice Portal and similar platforms.
1. CROSS-BORDER FAMILY RELATIONS IN THE EU

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. 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; 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.

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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).
Despite an overall decline in the number of marriages celebrated in the Union, the numbers of new international marriages rose from 216,995 in 2000 to 241,224 in 2007.5

1.2. The current state of EU legislation in the field

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’)6 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’).7 Among the matters excluded from the scope of the Regulation are maintenance obligations and property consequences8 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’)9 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

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4 EPEC (n. 3) p. 69.
5 EPEC (n. 3) p. 72.
8 Recital 8.
Cross-border activities in the EU - Making life easier for citizens

14 Member States. Today, it already applies in 15 and will soon apply in 16 out of 28 Member States.\textsuperscript{10}

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 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 \textit{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.

\textbf{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\textsuperscript{11} 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).

\textbf{Regulation (EU) No 4/2009 (‘Maintenance Regulation’)}

Regulation (EC) No 4/2009\textsuperscript{12} (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’).\textsuperscript{13}

\textsuperscript{10} 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).

\textsuperscript{11} Applies meanwhile in all Member States.

\textsuperscript{12} 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.

\textsuperscript{13} The 2007 Hague Protocol is, since 1 August 2013, applicable in all Member States except Denmark and the United Kingdom.
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 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\(^ {14}\) (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*.

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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.\(^{15}\)

**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.\(^{16}\) 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 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.\(^{17}\) 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.

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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 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. German law has, under the Rome III Regulation, become the law applicable to divorce. 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.

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. 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.

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.

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18 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.

19 Rome III Article 8(a).

20 EheG Sec. 55(2) and (3).


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.\(^{23}\) According to Austrian conflict of laws, however, the dissolution of the relationship with François would arguably be governed by Austrian law,\(^{24}\) which requires a ground for divorce and formal divorce proceedings also for registered partnerships.\(^{25}\) 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,\(^{26}\) 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,\(^{27}\) because Polish law has become applicable\(^{28}\) and fails to recognise inheritance rights of registered same-sex partners.\(^{29}\)

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.\(^{30}\) 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.\(^{31}\) 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.

\(^{24}\) IPRG Sec. 27d(1).
\(^{25}\) EPG Sec. 15 to 18.
\(^{26}\) ‘Eingetragene Partnerschaft’ under the EPG.
\(^{27}\) Successions Regulation Article 4.
\(^{28}\) 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).
\(^{30}\) 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-11513 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.
\(^{31}\) Rome III Regulation Article 13; Article 5b of document 15275/14 JUSTCIV 281 and Article 5b of document 15275/14 JUSTCIV 282, both of 10 November 2014.
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 p. 105 et seq.), as is illustrated by Example No 5.

**Example No 5:**

Nik and Lara, two Slovenian citizens, 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.\(^{32}\) However, according to the Successions Regulation, Austrian law has become the law applicable to succession.\(^{33}\) According to Austrian law Nik has no rights whatsoever\(^{34}\) 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

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\(^{33}\) Successions Regulation Article 21(1).

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\textsuperscript{35} 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, 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 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 \textit{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, 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.\textsuperscript{36} 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.\textsuperscript{37} The court in London will not consider the pre-
nuptial agreement as strictly binding,\textsuperscript{38} and may even disregard it, whereas it would have been fully upheld by a German court.\textsuperscript{39}

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\textsuperscript{40} (largely relying on the fault principle\textsuperscript{41}), whereas German conflict rules would refer to German law\textsuperscript{42} (no fault principle\textsuperscript{43}). Therefore, Detlef has strong incentives to rush to a German court, whereas Dirk possibly tries to rush to an Austrian court.

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.

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\textsuperscript{38} 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.

\textsuperscript{39} 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.

\textsuperscript{40} IPRG Sec. 27b(1).

\textsuperscript{41} 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.

\textsuperscript{42} EGBGB Article 17b(1).

\textsuperscript{43} IPartG § 15.
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.

<table>
<thead>
<tr>
<th>Matter</th>
<th>Jurisdiction</th>
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<tbody>
<tr>
<td>Divorce</td>
<td>Netherlands</td>
<td>Netherlands</td>
</tr>
<tr>
<td>Maintenance</td>
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<td>Austria</td>
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<td>Property in general</td>
<td>Netherlands</td>
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</tr>
<tr>
<td>Family home etc.</td>
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</tr>
<tr>
<td>Pension schemes</td>
<td>Germany(?)</td>
<td>Germany(?)</td>
</tr>
<tr>
<td>Parental responsibility</td>
<td>Austria/Netherlands</td>
<td>Austria</td>
</tr>
</tbody>
</table>

Dutch courts have jurisdiction for the divorce under the Brussels IIa Regulation\(^\text{44}\) and will, not participating in Rome III, in the absence of a choice of the applicable law by the parties, apply Dutch law.\(^\text{45}\)

Monika can sue Stefan for maintenance before an Austrian or Dutch court under the Maintenance Regulation;\(^\text{46}\) according to the 2007 Hague Protocol Austrian maintenance law will apply.\(^\text{47}\) Under Austrian law the question of maintenance claims between former spouses largely depends on who the court found to be at fault.\(^\text{48}\) This raises an issue as the Dutch courts will not go at all into the matter of fault in the context of divorce.\(^\text{49}\) 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 breakup of the marriage.

On the assumption that the Matrimonial Property Regulation passes the legislative process, Dutch courts will have jurisdiction concerning matrimonial property,\(^\text{50}\) but German law will

\(^{44}\) Brussels IIa Article 3(1)(a), fifth indent.
\(^{46}\) Maintenance Regulation Article 3(b) and (c). See, however, also Article 13 on related actions.
\(^{47}\) 2007 Hague Protocol Articles 3 and 5.
\(^{48}\) EheG Sec. 66 to 68.
\(^{49}\) [https://e-justice.europa.eu/content_divorce-45-nl-nl.do#toc_2](https://e-justice.europa.eu/content_divorce-45-nl-nl.do#toc_2).
\(^{50}\) Compromise text 15275/14 JUSTCIV 281 of 10 November 2014, Article 4(1).
be the applicable law. However, concerning the family home and similar matters, Dutch courts might apply 'overriding mandatory provisions' of the forum.

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. 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. 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. 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, 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. Parental responsibility is governed by Austrian law as the law of Sophie’s habitual residence.

**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. This is not only contrary to the trend in other recent EU instruments, 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.

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51 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.
52 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.
53 Compromise text Article 1(ea) excludes 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."
54 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).
55 EGBGB Article 17(3). It is questionable, though, whether this differentiation is compatible with the Treaties.
56 Brussels IIa Article 8.
57 Brussels IIa Article 12.
58 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.
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 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, p. 99) and Example No 7 (Detlef and Dirk, p. 102).

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 III60) or Spanish law (according to national conflict rules on registered partnerships61) 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

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60 Rome III Article 8(a).
61 EGBGB Article 17b(1).
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 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.62

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 Regulation63 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, 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 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, 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*. Much depends in this respect on the approach that will finally be taken by the Regulation on matrimonial property.

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 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, it is not clear whether a mediation

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64 See n. 53 for the approach taken by the Compromise text concerning matrimonial property.

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.

**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. 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 as well as for the ‘dynamic model’ described above (at 0, p. 110), 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;\(^66\)

- 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;\(^67\)

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\(^{66}\) 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.

\(^{67}\) 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.
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.

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.

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.
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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<th>Description</th>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>BGB</td>
<td>German Civil Code of 1 January 1900</td>
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<tr>
<td>CNEU</td>
<td>Council of Notariats of the European Union</td>
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<tr>
<td>EGBGB</td>
<td>Introductory Law to the German Civil Code of 18 August 1896</td>
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<tr>
<td>ECS</td>
<td>European Certificate of Succession</td>
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<tr>
<td>Rec.</td>
<td>Recital</td>
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<tr>
<td>EU Succession Regulation</td>
<td>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</td>
</tr>
<tr>
<td>EU Maintenance Regulation</td>
<td>Regulation No 4/2009 of the Council of 18 December 2008 on international jurisdiction, recognition and enforcement of foreign decisions</td>
</tr>
<tr>
<td>IPL</td>
<td>international private law</td>
</tr>
<tr>
<td>Rome III Regulation</td>
<td>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</td>
</tr>
<tr>
<td>Hague Convention</td>
<td>Hague Convention of 1961 on the Form of Testamentary Dispositions</td>
</tr>
<tr>
<td>Maintenance Regulation</td>
<td>COUNCIL REGULATION (EU) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in maintenance matters</td>
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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 https://e-justice.europa.eu
2 http://www.successions-europe.eu/
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 Notarinstutit in 2002. 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 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. 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 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.

3 Rev.crit. 2012, p. 691
4 See Süß 2nd edition country report on the Netherlands
2. THE SUCCESSION REGULATION – KEY PRINCIPLES AND ASSESSMENTS

2.1.

With effect from 17 August 2015 the European Succession Regulation\(^5\) 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\(^6\) 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 (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

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\(^6\) Bonomi in Bonomi/Wautelet, introduction, marginal notes 23 et seq., Lagarde op. cit. p. 692
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’.\(^7\)

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’.\(^8\)

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.\(^9\) 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.

\(^7\) Bonomi in Bonomi/Wautelet, introduction, marginal note 26
\(^8\) Bonomi op. cit. marginal note 26
\(^9\) 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/Herrerl 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.10

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 numeros 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.).11

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

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10 Now probably general opinion, see Bonomi/Wautelet, introduction, pp. 13 et seq.; Dutta in FamRZ, 2013, p. 3
11 See on this under Article 25 and Bonomi/Öztürk in Dutta/Herrler DNotI marginal notes 44–50
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.

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.12

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.

12 See Chapter 12 below
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 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. 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-

13 According to Dörner in ZEV 2012, pp. 512, 513
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.

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 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). 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,


15 See Lorenz in Dutta/Herrler DNotI 2013
advancements or legacies made inter vivos also fall within the scope of the EU Succession Regulation. 16

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 literature17 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.

16 See also Max Planck Institute, 2010, 522, p. 631, No 176; Herzog ErbR 2013, p. 3
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 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.\(^\text{18}\) 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.

\(^\text{18}\) See Janzen DNotZ 2012, pp. 484, 491, and Brussels I 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.\(^\text{19}\)

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.\(^\text{20}\)

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\(^\text{19}\) See also Bonomi in Bonomi/Wautelet, Article 21, marginal note 24

\(^\text{20}\) 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).\(^{21}\) 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.\(^{22}\) 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\(^{23}\), 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.\(^{24}\) 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

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\(^{21}\) With reservations about this Lagarde op. cit. No 31; see Lechner in Dutta/Herrler DnotI, marginal notes 40/41
\(^{22}\) For criticism of the concept, see Lorenz in Dutta/Herrler DnotI, marginal note 15 with citations
\(^{23}\) Lagarde op. cit., ‘protéger les héritiers réservataires’
\(^{24}\) 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
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. 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.

On some issues 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.

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. 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.

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.

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25 See reasons in Commission’s proposal No 4.3.
26 See on this Solomon op. cit., marginal notes 7 et seq.
27 CJEU of 22 December 2010 C-497-10, see also Döbereiner, Odersky, Solomon op. cit.
28 According to Odersky Notar 2013, pp. 7 et seq.; Janzen DNOtZ 2012, p. 484
29 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
30 See Dutta in FamRZ, 2013, pp. 3, 8
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.  

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 dispossession 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.

31 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
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.32 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

32 See Bonomi in Bonomi/Wautelet, Article 24, marginal note 7 and Bonomi/Öztürk in Dutta/Herlier DNotI 2013, marginal notes 44 et seq., otherwise Döbereiner MittBayNot 2013, 35, 356
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.33

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.34 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.35 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 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.36

33 Doubting Leitzen in ZEV 2013, p. 128, agreeing Odersky in notar 2013, 3,6, as well as the clear wording.
34 See on this the presentations in Süß Erbrecht in Europa 2002 country reports
35 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’.
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.

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.

37 Bonomi in Dutta/Herrler DNatI 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.
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 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 matters38 and the inheritance portal of the Council of Notariats of the EU39, 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/recipient 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

38 https://e-justice.europa.eu
39 www.successions-europe.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.
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. 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.

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40 See Lein in Duta/Herrier DNOTI 2013, marginal note 32.
41 See Dutta in FamRZ, 2013, p. 12; Janzen DNotZ 2012, pp. 484, 490
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 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 residence in a third State which is obviously only for the purpose of riding roughshod over reserved shares, application could be considered.

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.

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.

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42 Pataut Study for the European Parliament, Nov. 2010
43 See the case of Rauscher in Dutta/Herrler DNotI 2013, p. 129
44 See Stürner in GPR 2014, pp. 317 et seq.; see Bonomi op. cit., Article 22, marginal notes 77–81
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’. 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.

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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.46

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 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. 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.

47 Regarding the Consular Agreement, see Dörner in Staudinger (2007) Vorb. Re Article 25 f EGBGB, recitals 160–192; see Süs in Dutta/Herrler NOTI
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.\textsuperscript{48} Associated conflicts and decision processes in the 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\textsuperscript{49}, 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.

\textsuperscript{48} Rabels Z. 2010, pp. 532 et seq. and p. 710
\textsuperscript{49} Ruling of 31 March 1971 – 22-70, CJEU Opinion of 7 February 2006 (Lugano) 1-03; see also Regulations 662/2009 and 664/2009
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. 50 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 residence and even when the succession procedure in France was handled under French law. 51 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. 52 Article 83(2) of the EU Succession Regulation does not specify that the law of nationality must permit the choice of law but

50 Schoppe IPLax 2014, pp. 27 et seq.
51 See Döbereiner in Süß 2nd edition country report on France recital 16
52 See Lechner in ZERB 2014, pp. 191, 192, Döbereiner in MittBayNot 2013, p. 445
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.

**Biography**

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REFERENCES

Bonomi/Wautelet, Le droit européen des successions 2013
Buschbaum/Simon, EU-ErbVO: Das Europäische Nachlasszeugnis, ZEV 2012, p. 525
Döbereiner, Das internationale Erbrecht nach der EU-Erbrechtsverordnung, MittbayNot 2013, pp. 358–366, pp. 437–446,
Dörner, Die Verordnung zum Internationen Erb- und Erbverfahrensrecht ist in Kraft, ZEV 2012, pp. 505 et seq.
Derselbe, Das deutsch-türkische Nachlassabkommen, ZEV 1996, pp. 90 et seq.
Dutta, Das internationale Erbrecht der Europäischen Union – Eine erste Lektüre der Erbrechtsverordnung, FamRZ 2013, pp. et seq.
Herzog, EU-Erbrechtsverordnung ErbR 2013, pp. 2 et seq.,
Janzen, Die EU-Erbrechtsverordnung, DNotZ 2012, pp. 484 et seq.
Kleinschmidt, Optionales Erbrecht: Das Europäische Nachlasszeugnis als Herausforderung an das Kollisionsrecht, RabelsZ 77 (2013), pp. 723 et seq.
Köhler, in Kroiß/Horn/Solomon, Nachfolgerecht (2014), Einführung zur EUerBVO
Lagarde, Les principes de base du nouveau règlement sur les successions, Rev.crit. DIP 2012 numero 4, pp. 691 et seq.
Lechner, Die EUerBVO im Spannungsfeld zwischen Erbstatut und Sachenrecht IPrax 2013, pp. 497 et seq.
Idem, Erbverträge und gemeinschaftliche Testamente in der neuen EU-ErbVO, NJW 2013, pp. 26 et seq.
Idem, Die Entwicklung der EUerBVO ZErb 2014, pp. 188 et seq.
Leitzen, Die Rechtswahl nach EUerBVO ZEV 2013, pp. 128 et seq.
Mankowski, Das erbrechtliche Viertel nach § 1371 Abs. 1 BGB im deutschen und europäischen Internationalen Privatrecht, ZEV 2014, pp. 121 et seq.
Margonski, Ausländische Vindikationslegate nach der EU-Erbrechtsverordnung, GPR 2013, pp. 106 et seq.
Nordmeier, Neues Kollisionsrecht für gemeinschaftliche Testamente, ZEV 2012, pp. 513 et seq.,
Idem, Erbverträge und nachlassbezogene Rechtsgeschäfte in der EUerBVO – Eine Begriffsklärung, ZEV 2013, pp. 117 et seq.
Odersky, Die Europäische Erbrechtsverordnung in der Gestaltungspraxis, notar 2013, pp. 3 et seq.
Omlor, Gutglaubensschutz durch das Europäische Nachlasszeugnis GPR 2014, pp. 216 et seq.
Schoppe, *Die Übergangsbestimmungen zur Rechtswahl im internationalen Privatrecht*, IPLax 2014, pp. 27 et seq.
Simon/Buschbaum, *Die neue EU-Erbrechtsverordnung*, NJW 2012, pp. 2393 et seq.,
Süß, *Das Europäische Nachlasszeugnis*, ZEuP 2014, pp. 725 et seq.
Thorn in Palandt, 74th edition (2015) *EGBGB/EU Succession Regulation*
Pataut, *Studie für Europäisches Parlament zum ordre-public im Vorschlag der Kommission zur EUErbVO*, Nov. 2010
Walther, *Die Qualifikation des § 1371 Abs. 1 BGB im Rahmen der europäischen Erb- und Güterrechtsverordnungen* GPR 2014, pp. 325 et seq.
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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

*Eve Pötter*

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

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\(^1\) 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 2015.2

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.3

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 2015.4 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 Union5. 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.6 Thirdly, it establishes rules on the recognition and enforcement of decisions,7 authentic documents and court settlements of Member States8 and finally, it establishes the European Certificate of Succession,9 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,10 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

2 Article 84
3 Point 9 of the Recital
4 Articles 1(1) and 83(1)
5 Articles 4-19
6 Articles 20-38
7 Articles 39-58
8 Articles 59-61
9 Articles 62-73
10 points 82 and 83 of the Recital
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. 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 ease the 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\textsuperscript{11} 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 to the 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\textsuperscript{12}, recasted Brussels I a regulation\textsuperscript{12} 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. 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 and if the 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. 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. 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. 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. 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.

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

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13 On enforceability see Articles 43, 60(1) and 61(1).
14 Articles 15
15 Article 10(1)
16 Article 10(2)
17 The principle of lex rei sitae applies usually in common law systems, for example in the United Kingdom and USA.
18 Article 12
19 redundant see Footnote 16
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.\textsuperscript{20} 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 \textit{forum necessitatis} should, however, be exercised only if the case has a sufficient connection with the Member State of the court seized.\textsuperscript{21}

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.\textsuperscript{22}

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,\textsuperscript{23} either by concluding a written agreement \textsuperscript{24} or by expressly accepting and requesting it.\textsuperscript{25} It should be 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.\textsuperscript{26} 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\textsuperscript{27} is established, in which case the latter shall decline its jurisdiction in favour of that court.\textsuperscript{28} 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.\textsuperscript{29}

\begin{itemize}
  \item Article 11
  \item Point 21 of the Recital
  \item for the current legislation of the Member States see webpage on the Succession in Europe http://www.successions-europe.eu/en/home
  \item Article 22(1)
  \item Articles 5(1), 7(b)
  \item Articles 6(a) and 7(c)
  \item Articles 17 and 18 but it may also be derived from Articles 6, 7 and 8.
  \item The criteria for the determination which court has been seized first is provided in Article 14.
  \item Article 17
  \item Article 18
\end{itemize}
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. 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.

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. 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.

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 from the cases were the parties have made a request for the court to decline the jurisdiction. If the choice of court agreement must be in a written form and concluded between the parties concerned 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 with the precondition that the court of general competence has declined its jurisdiction. It should be noted that the written choice of court agreement and expressed 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.\textsuperscript{39}

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.\textsuperscript{40}

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.\textsuperscript{41}

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.\textsuperscript{42}

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.\textsuperscript{43} For instance Estonia has concluded legal aid agreements with Russia\textsuperscript{44} and Ukraine\textsuperscript{45} 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

\textsuperscript{39} See Article 9, according to which jurisdiction of a court may be accepted silently by appearing before the court or contested.
\textsuperscript{40} Article 13
\textsuperscript{41} Article 28
\textsuperscript{42} See article 29 for special rules on the appointment and powers of an administrator of the estate
\textsuperscript{43} 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.
\textsuperscript{44} RT II 1993, 16, 27
\textsuperscript{45} RT II 1995, 13, 63
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legal aid agreements also with Poland\(^{46}\) and Latvia and Lithuania\(^{47}\), 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. \(^{48}\) 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.\(^{49}\)

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\(^{50}\) and it has an autonomous meaning specific to EU law.\(^{51}\) 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.\(^{52}\)

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.\(^{53}\) In assessing, whether the deceased had the habitual residence in a Member State, then all the factual circumstances should be taken into account.

\(^{46}\) RT II 1999, 4, 22
\(^{47}\) RT II 1993, 6, 5
\(^{48}\) 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.
\(^{49}\) See points 24 and 25 of the Recital
\(^{50}\) See for example C-90/97 Swaddling, point 29
\(^{51}\) C-255/13, I v Health Service Executive, point 43, but see also C-66/08 Szymon Kozłowski, 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.
\(^{52}\) C-489/10 Janina Wencel, point 49, see also C-372/02 Roberto Adanez-Vega, point 37.
\(^{53}\) 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 Merced 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.”

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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.54

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 its 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.55 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.56

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.57 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

54 Point 23 of the Recital
55 Point 21 of the Recital
56 Point 20 of the Recital
57 Derived from Articles 63 and 67
Succession because they are the only authorities responsible for the succession procedures in a given Member State.\textsuperscript{58}

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 5\textsuperscript{th} of July 2012.\textsuperscript{59} 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 16\textsuperscript{th} of November 2016.\textsuperscript{60} 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 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\textsuperscript{61} 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.\textsuperscript{62}

It is explained in Recital that the non-judicial authorities are not bound by the jurisdiction provisions\textsuperscript{63} 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.\textsuperscript{64} The provisions on jurisdiction do not

\textsuperscript{58} 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
\textsuperscript{59} Articles 3(2), 79, 84
\textsuperscript{60} Article 78(1)(c)
\textsuperscript{61} Article 15
\textsuperscript{62} Article 8 and 6(b)
\textsuperscript{63} Point 20 of the Recital
\textsuperscript{64} Point 36 of the Recital
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 and it is issued on voluntary bases only when the beneficiaries of succession have applied for it. It is not up to the 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.

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

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65 Article 62(2)  
66 Articles 65(1) and 63(1)  
67 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.
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.

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. 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?

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68 Article 5(2)
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 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 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 the creditor 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.

69 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 the 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.\(^{70}\)

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.\(^{71}\)

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\(^{72}\) 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.\(^{73}\)

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.\(^{74}\)

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,\(^{75}\) 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.\(^{76}\)

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

\(^{70}\) Article 20
\(^{71}\) Article 21(1)
\(^{72}\) Article 21 (2)
\(^{73}\) Point 25 of the Recital
\(^{74}\) Articles 22(3) and 3(1)(d)
\(^{75}\) Article 21(1)
\(^{76}\) Article 22(1)
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to inherit, liability of debts, sharing the estate etc. that fall within the scope of the applicable law77.

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, regardless 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 situ 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.78

In addition to rules on choice of law that could be chosen when making orders for the disposial of property upon death, the Succession Regulation also provides rules on the assessment of substantive validity of such acts79, 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.80

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.81 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.82 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,83 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,84 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

77 Articles 23
78 The principle of lex sitae applies for example in the United Kingdom and USA.
79 Article 25 on succession agreements and Article 24 on all other forms of acts on disposition of property upon death.
80 Article 26
81 Article 27
82 Convention may be found http://www.hcch.net/index_en.php?act=conventions.text&cid=40
83 according to article 4 of the Convention
84 Article 1(2)(f)
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.\(^{85}\)

Reference is made in the Succession Regulation\(^{86}\) 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 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.\(^{87}\)

Even if according to the Convention rules of conflicts laid down in the Convention shall apply independently of any requirement of reciprocity,\(^{88}\) 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.\(^{89}\)

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\(^{90}\) 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.\(^{91}\)

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.\(^{92}\)

Even though the Regulation itself shall be applied only to the succession of the estate of deceased persons,\(^{93}\) 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

\(^{85}\) See explanations also under point 1.1.
\(^{86}\) Article 75(1)
\(^{87}\) Article 75(1)
\(^{88}\) Article 6 of the Hague Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Disposition
\(^{89}\) 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](http://www.hcch.net/index_en.php?act=conventions.status&cid=40) for the parties of the Convention.
\(^{90}\) Article 22(3)
\(^{91}\) 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.
\(^{92}\) Article 83
\(^{93}\) Article 1
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 17\textsuperscript{th} 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 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.\textsuperscript{94}

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.\textsuperscript{95}

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

\textsuperscript{94} §§ 104, 105 of the Law of Succession Act
\textsuperscript{95} Succession in Europe webpage http://www.successions-europe.eu/en/belgium/topics/restrictions-on-the-
freedom-to-dispose-of-ones-succession-by-will/
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.\(^{96}\) 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.\(^{97}\)

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.

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).\(^{98}\)

\(^{96}\) Article 13
\(^{97}\) Article 23(1)
\(^{98}\) To find out more about CNUE see http://www.notaries-of-europe.eu/
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. The European Certificate of Succession produces its effects in all the Member States, without any additional procedures. 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.

The European Certificate of Succession is not a mandatory document 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. Once the application is made, the authority of a Member State must issue the European Certificate of Succession without delay and it has the obligation to inform all the beneficiaries that an application for the European Certificate of Succession has been submitted and that the certificate itself has been issued.

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 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 application amongst other things also the intended purpose of the certificate accompanied by the necessary documents to the extent that is necessary for the issuing authority to verify the information provided.

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. 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. The issuing authority is entitled to

99 Article 63
100 Article 69(1)
101 Article 62(3)
102 Article 62(2)
103 Article 64(1)
104 Article 67(1)
105 Article 66(4)
106 Article 67(2)
108 Article 65(3)(f)
109 Article 65(3)
110 Article 70(3)
111 Articles 70(2) and 70(3)
issue the certified copy of the certificate also to any persons who would demonstrate their legitimate interest. 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, 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, 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.

It is specified in the Regulation that the European Certificate of Succession may be issued only by the authorities of a Member State which have jurisdiction to settle a succession 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.

The Succession Regulation lays down a list of the compulsory elements that must be included in the content of the European Certificate of Succession. 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 authority to decide how the

112 Article 70(1)
113 The list of persons entitled to submit an application is provided in Articles 65(1) and 63(1).
114 Article 62(3)
116 See point 1.3. on the authorities issuing certificates.
117 Article 71
118 Article 68
Cross-border activities in the EU - Making life easier for citizens

certificate should look like and what elements it should contain to the extent required for the purpose for which it is issued.119

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 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 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. 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. 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

119 ibid
120 Article 1(2)(l)
121 §§24-29, English version is available in https://www.riigiteataja.ee/en/eli/513112013009/consolide
123 The effects of the European Certificate of Succession are listed in Article 69 of the regulation, as described above.
Policy Department C: Citizens’ Rights and Constitutional Affairs

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 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.”

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.

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.

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125 Point 71 of the Recital
CONCLUSION

The Succession Regulation imposes to the authorities of the Member States several obligations and it seems that the regulation 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.126 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 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 1972,127 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.128 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 Wills129, however, no reference is made to it in the Succession Regulation. In

126 Article 78(1)(c) and 79
128 Article 1 of the Convention on the Establishment of a Scheme of Registration of Wills
129 See more on http://www.arert.eu/?lang=en
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 State, 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.130 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.

**Biography**

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130 Article 66(5)
Session II - Cross border families and families crossing borders

Hans van Loon
The Brussels IIa Regulation: towards a review?

Paul Lagarde
Name Law - is there a need to legislate?
The provisions on parental responsibility of the Brussels IIa Regulation build on the 1996 Hague Child Protection and 1980 Abduction Conventions, but with some significant departures. These provisions are examined in light of the changed profile of many abductors and left-behind parents. Suggestions are made to re-align the Regulation more to the 1996 Convention, to include a chapter on applicable law, and to add provisions dealing with relocation and mediation, promoting speed of (return) proceedings and judicial cooperation.
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<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td><strong>1996</strong></td>
<td>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</td>
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<tr>
<td><strong>CJEU</strong></td>
<td>Court of Justice of the European Union</td>
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<tr>
<td><strong>CRC</strong></td>
<td>UN Convention of 20 November 1989 on the Rights of the Child</td>
</tr>
<tr>
<td><strong>ECHR</strong></td>
<td>European Convention on Human Rights</td>
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<tr>
<td><strong>ECrtHR</strong></td>
<td>European Court of Human Rights</td>
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<tr>
<td><strong>EU Charter</strong></td>
<td>Charter of Fundamental Rights of the European Union</td>
</tr>
<tr>
<td><strong>Hague Conference</strong></td>
<td>Hague Conference on Private International Law</td>
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<tr>
<td><strong>MS</strong></td>
<td>Member State(s)</td>
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EXECUTIVE SUMMARY

Background

In 2015, all 28 EU Member States will be bound by the 1996 Hague Convention on Protection of Children, thus completing the EU’s reception of the global legal framework for the international protection of children under civil law, consisting of the broad norms of the UN Convention on the Rights of the Child (CRC) and the practical private international law arrangements of the 1980 Hague Child Abduction Convention and the 1996 Convention.

This provides an opportunity to revisit the provisions on parental responsibility of the Brussels IIa Regulation. These Articles have been primarily inspired by the 1996 Convention, and they build on the 1980 Convention. But they also depart from those instruments in significant respects. In an effort to reinforce the 1980 Convention’s return mechanism, the Regulation re-defines the balance established by the 1996 and 1980 Conventions between the competences of the courts of the Member State (MS) of the child’s habitual residence, and the MS to which the child is taken. The Regulation not only underpins the powers of the former, but also reduces those of the latter.

Significant developments have occurred in recent years, however, which, instead of diminishing the importance of that balance and of the cross-border cooperation between courts and central authorities which it supports, have accentuated its crucial role in promoting such cooperation. These developments concern, first, the recognition of the child as a subject of rights, and of his/her role in (return) proceedings. They relate, secondly, to the changed profile of the other protagonists: the taking parent, who, in contrast to the past, in two-thirds of the cases is now the primary carer of the child, most often the mother of the child; and the left-behind parent, regularly the father, who is now often using the return mechanism of the Regulation to obtain access to, rather than return of, the child.

Aim

In order to adapt the Regulation better to the current legal-sociological reality both within the EU and in its relations to third States, suggestions are made –

- To realign the Regulation more to the 1996 Convention and to re-establish the aforementioned balance, thus also further harmonising the protection of children within the EU and in relations with third States Parties to the 1996 Convention;
- To include in the Regulation an express – instead of an oblique – reference to the Chapter on applicable law of the 1996 Convention; and,
- To add an article on relocation, and provisions aimed at promoting speed of (return) proceedings, including agreed solutions through mediation, and promoting judicial and administrative cooperation.

Following a short Introduction and a Background study, Chapter 3 offers a number of concrete proposals for amendment of the Regulation, a summary of which is presented in the Annex – Summary of Recommendations.
**1. INTRODUCTION: THE BRUSSELS IIa REGULATION – ITS PROVISIONS ON PARENTAL RESPONSIBILITY**

**1.1. The two facets of the Brussels IIa Regulation**


As follows from Article 1(2), for the purpose of the Regulation, “parental responsibility” includes a wide range of matters: rights of custody and rights of access; guardianship, curatorship and similar institutions; designation and functions of any person or body having care of the child’s person or property, representing or assisting the child; placement of the child in a foster family or in institutional care; and measures for the protection of the child relating to the administration, conservation or disposal of the child’s property.

This non-exhaustive list (“in particular”) corresponds in essence with Article 3 of 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. This instrument served as a source of inspiration for the negotiations on the Regulation, although it was not in force for any of the then EU Member States (MS).

In contrast to the Regulation, however, the 1996 Convention does not establish a system of rules of jurisdiction and recognition and enforcement of judgments in matrimonial matters, but deals with these matters only in a lateral fashion. This is because issues of parental responsibility may arise in the context of matrimonial proceedings, but only in a (declining) number of States requiring the resulting judgments to include decisions on such issues. Besides, decisions on the appointment of a guardian, or the placement of a child in an institution, will as a rule be taken outside of divorce proceedings, often by specialised courts and in a different context. Why, then, does the Regulation combine matrimonial and (all these) child protection matters? This is explained by its genesis.

Regulation (EC) No 1347/2000, the Regulation’s predecessor, was essentially based on the Brussels II Convention of 28 May 1998. Both remained within the boundaries of an instrument on matrimonial matters with ancillary rules on children – limited to a single article on jurisdiction on “parental responsibility” (Art. 3) and a reference, for jurisdiction in matters of child abduction, to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Art. 4). As we shall see (infra 2.2.), Regulation No 1347/2000’s revision led to a considerable extension of the instrument’s substantive scope concerning the protection of children. The new Regulation Brussels IIa ended up

1 Art. 1(1) a) 1996 Convention refers to these items as “measures directed to the protection of the person or property of the child”.

2 It does so, in its Art. 8 (enabling prorogation of jurisdiction to the authorities of a State seized with an application for divorce, legal separation or annulment of the marriage), and in Art. 10 (enabling the authorities, when exercising jurisdiction in matters of divorce, legal separation or annulment of the marriage, also to take measures of protection of the child). In such cases, Chapter III determines the law to be applied, Chapter IV provides for the recognition and enforcement of the measures taken, and Chapter V organises administrative cooperation through Central Authorities.

3 As the Borrás Report on the Brussels II Convention notes: “... in some States the legal system requires that the decision on matrimonial matters includes parental responsibility, while in others matrimonial and child-protection issues follow totally separate routes ... For that reason, separate problems had to be faced and it was difficult to bring all States to accept the text in paragraph 1(b) which includes the issue in this Convention rather than leaving it for a separate text... It is a question, however, only of the matters relating to parental responsibility that appear to be linked to the matrimonial proceedings when those take place (see Article 3(3)).” Explanatory Report by A. Borrás, OJ C 221, 16 July 1998, para. 23 (emphasis added).
incorporating the essence of many provisions of the 1996 Convention in combination with rules supplementing the 1980 Convention. These new rules on protection of children largely operate independently from those on matrimonial matters.

Consequently, the present Regulation combines two generally distinct subject matters. The difference is further illustrated by the dissimilar applicable law regimes. In matrimonial matters the Rome III Regulation\(^4\) harmonises the law applicable to divorce and legal separation for the 16 EU Member States bound by it\(^5\), and offers the parties a limited choice of law. By contrast, in matters of parental responsibility, the Regulation refers, indirectly, to the rules of Chapter III – Applicable Law (Arts 15-22) – of the 1996 Convention, which will shortly be applicable in all MS. Those rules are based on proximity between the child and the authorities, and in principle leave no room for party autonomy.

Following the Regulation’s extension to child protection measures generally, the rationale for combining them with matrimonial matters in the same instrument is no longer obvious\(^6\). At this stage, however, the conclusion suffices that the Regulation covers two largely different matters, to be studied on their own merits and in their proper context. After a short comment on matrimonial matters, this paper will focus on parental responsibility. Only a limited number of issues can be examined. In particular, issues relating to the final stage of the enforcement of judgments will not be discussed, although it is often at that stage that serious complications arise. However, this is a matter for national law beyond the Regulation’s reach.

### 1.2. Short comment on “matrimonial matters”

Regarding matrimonial matters, the general ideas put forward by the Commission in its Report of 15 April 2014\(^7\) – reducing the “rush to court” and introducing a limited possibility for choice of court by the parties and a \textit{forum necessitatis} – seem to be sensible. If a further exploration of these ideas were to lead to a reduction of the wide range of grounds of jurisdiction currently available under the Regulation, it might pave the way for a later adaptation of Rome III. And this, in turn, might ultimately facilitate the incorporation of the (possibly by then revised) rules of Rome III into a new, self-standing instrument that would offer a complete and coherent set of private international law rules for divorce and separation\(^8\).


\(^5\) Greece’s request to participate was approved in 2014; the Regulation will apply to Greece as of 29 July 2015.


\(^8\) The fact that, at this point, only 16 EU MS are bound by Rome III makes it less obvious to suggest including a reference to Rome III in Regulation Brussels IIa for the law applicable to divorce and separation, contrary to what will be proposed \textit{infra} 3.2 regarding parental responsibility.
2. BACKGROUND

2.1. Parental responsibility – The global legal framework

Cross-border issues relating to child protection including parental responsibility are not limited to EU Member States. Disputes over custody, contact and parental child abduction; issues of protection of minors (refugee, asylum seeking, displaced or runaway children); cross-frontier placements of children; or representation and protection of the child’s property may, and do, occur around the world.

The 1989 UN Convention on the Rights of the Child (CRC) provides the general normative background to States’ responsibility in matters of child protection. The CRC has been ratified by 194 States, including all EU MS. The CRC pays specific attention to child protection issues arising in cross-border situations, such as personal relations and contact between children and parents living in different States (Art. 10(2)), or parental child abduction (Art. 11). The drafters realised that these situations presented additional risks and legal issues for children and families, and also that the CRC could not deal with them in detail. Therefore, the CRC, in several of its Articles, calls on States to conclude or accede to particular international instruments to deal with these issues in a more concrete manner.

The 1980 Hague Child Abduction Convention, although adopted nine years before the CRC, may be seen as the world’s leading instrument providing nuts and bolts to Article 11 CRC. The 1980 Convention now has 93 States Parties, including all EU MS. It provides a specific remedy to prevent and combat abduction abroad of children. It also facilitates contact between children and their parents. While the Convention is expressly based on the idea that decisions on custody, access and relocation belong to the authorities of the child’s habitual residence, it does not spell out rules of jurisdiction, applicable law, or recognition and enforcement of decisions. This is where the 1996 Convention comes in.

The 1996 Convention may be seen as implementing various provisions of the CRC, including Articles 3, 9 and 10, on personal relations and contact between parents and children, 12, on the child’s opinion, 18, on parental responsibilities, 19, on protection from abuse, 20, on alternative care, 22, on refugees, and 35, on child trafficking. Currently the 1996 Convention has 41 States Parties, including all of the EU MS (Denmark included) with the exception of Italy; but Italy’s ratification is imminent.

The 1996 Convention offers an integrated inclusive system of child protection. As part of its wide range of functions, the Convention provides a structure for the resolution of issues of custody and contact which may arise when parents are separated and living in different countries. In respect of child abduction, the 1996 Convention reinforces the 1980 Convention in several ways (see infra 2.4.3. (b))

The combination of CRC, 1996 and 1980 Conventions provides a comprehensive global system for the protection of children under civil law. Since as of 2015 all three instruments will be in force for all 28 EU MS, it is timely to look again at the Regulation’s provisions on parental responsibility in light of this global framework. Where does the Regulation reinforce this framework? And where might it need adaptations to better serve its purpose?

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9 E.g., Art. 11 CRC: “1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad. 2. To this end, States Parties shall promote the conclusion of ... or accession to existing agreements.”
10 Third States include, among others, Australia, the Russian Federation, Ukraine, Georgia, Albania, Switzerland, Morocco, Ecuador, Uruguay; the United States of America has signed the Convention and is preparing ratification.
2.2. Assumptions underlying the drafting of the Regulation’s provisions on child abduction

Following the conversion of the Brussels II Convention into the Brussels II Regulation, France, in 2000, took the initiative for a scheme aimed at abolishing *exequatur* for judgments falling under the Regulation granting cross-border rights of access to one of the parents. This proposal remained within the framework of the Brussels II Regulation.

The direction changed, however, with the Commission proposal of 2001 for a separate Regulation\(^{11}\), which alongside wrongful retentions also addressed wrongful removals. The proposal aimed at strengthening the protection of the left-behind “custodial parent”, not only by *reinforcing* the role of the *court of the habitual residence*, but also by *reducing* that of the *court of refuge*\(^{12}\). Subsequently, this proposal was merged with the French initiative, which resulted in a new Commission proposal for a revision of the Brussels II Regulation\(^{13}\).

The purpose of the new proposal remained to tighten the mechanism for the return of children to the “custodial parent”. The underlying assumption was that the 1980 Convention, and in particular the application of the exception provided by its Article 13(1) \(b\)\(^{14}\), was not operating satisfactorily. The Commission proposals excluded all possible exceptions to return provided by the 1980 Convention\(^{15}\). On the other hand, they introduced the important principle of mandatory hearing of the child, and emphasised the need for cooperation among central authorities.

The proposals to replace the 1980 Convention by a specific intra-EU automatic return mechanism led to intense negotiations. Finally, in November 2002 a compromise was reached, embodied in the current Regulation. The 1980 Convention remained applicable, but was supplemented by provisions for intra-EU cases to reinforce the return mechanism.

In retrospect, the perception that the 1980 Convention’s exceptions to return, in particular Article 13(1) \(b\)\(^{16}\), were not applied with restraint in the EU would seem not to be fully supported by the facts. The statistical survey of applications for return made in 1999 showed that only a relatively small number of return applications were refused\(^{17}\). Conclusions of the Fourth Special Commission of the Hague Conference on Private International Law on the operation of the Convention (22-28 March 2001) confirmed this\(^{18}\), and so did judicial conferences and academic conferences and writings\(^{19}\). There is, therefore, some doubt regarding the perceived need to tighten the 1980 Convention’s

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\(^{11}\) Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility (COM(2001) 505 final — 2001/0204(CNS)).

\(^{12}\) The court of refuge was obliged to order the immediate return of the child to the State of the habitual residence; the taking parent could not invoke any of the exceptions to return of the child provided for by the 1980 Convention. At most, in “urgent cases” the court of refuge could order “provisional measures as may be available under [its] law” and suspend the return until the court of origin decided on the substance of the matter.


\(^{14}\) According to the May 2002 Commission Proposal, the obligation to return the child was imposed not on the court of the MS of refuge, but on its Central Authority. The only way to prevent the immediate return was to request the court to take a protective measure, which could only be ordered on the basis of the grave risk of harm exception or the objections of the child.


return mechanism in intra-EU cases\textsuperscript{18}. In any event, recent developments suggest that the Regulation’s approach may call for a fresh look.

### 2.3. Significant developments since the adoption of the provisions on parental responsibility, in particular in respect of child abduction

#### 2.3.1. Reinforcement of children’s rights

A lasting contribution of the UN Convention on the Rights of the Child is the awareness and respect for the child’s best interests and rights it has incited, and its recognition that children are independent persons, who hold rights. The CRC’s impact on the European Charter of Fundamental Rights is manifest in Article 24 thereof:

“1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.

3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”

The Regulation repeatedly emphasises the need for the child to be given an opportunity to be heard\textsuperscript{19}. This has significantly reinforced the child’s procedural role in matters of parental responsibility, going beyond both the 1980 and 1996 Conventions. However, practice continues to vary amongst EU MS in respect of the conditions, criteria and methods for the child’s hearing, and the child’s role in relocation proceedings and in the context of mediation is still evolving and far from uniform (See infra recommendations 3.1.2. and 3.1.4.).

Another major aim of the Regulation is to reinforce the child’s fundamental right to contact with both parents. The return mechanisms of the 1980 Convention and the Regulation, in principle, serve this purpose. However, the social and legal reality prevailing when the 1980 Convention was negotiated has significantly changed in recent years.

#### 2.3.2. The changed profile of the taking parent and the left-behind parent

The typical case of wrongful removal or retention of children envisaged by the drafters of the 1980 Convention was that by a non-custodial parent or a parent who feared that he would lose custody\textsuperscript{20}. At that time, joint custody or legal restrictions on the removal of children from the jurisdiction of their habitual residence were not yet common. The obvious answer to the taking of the child by the non-custodial parent was to ensure the immediate return of the child, in order to reunite him or her with the primary care-taker. There is broad agreement that this answer has worked, and that the Convention in this respect has largely met its objective.

Since the adoption of the 1980 Convention, however, this paradigm has shifted. Granting of joint custody has become common, as have restrictions on the removal of children. Certain removals of children that used to be lawful have now become unlawful, leading to a wider applicability of the Convention than foreseen. Combined with the Convention’s success in preventing and combatting abductions by non-custodial parents, the result is that

\begin{footnotesize}
\textsuperscript{18} Critical of the genesis of the Regulation in this respect, Trimmings (\textit{supra} fn. 17).

\textsuperscript{19} See Arts 11(2); 23(b); 41(2)(c); 42(2)(a).

\end{footnotesize}
nowadays in two-thirds of the cases the abductor is the primary care-taking parent, often the mother, often returning to her home country. In many cases the (alleged) reason for the abduction is domestic violence, and there is more awareness today of the harm which domestic violence may do to children.

Moreover, the Convention is now being used more often by fathers (married or unmarried) to enforce their (joint) rights to determine the child’s place of residence, which makes the original sharp distinction between rights of custody – to be protected by the prompt return mechanism – and rights of access – which were to be ensured by other arrangements – less obvious than the 1980 Convention drafters had in mind.

During the past decade, courts, including at the European level the European Court of Human Rights, and legislative bodies, including at the global level the Hague Conference, have had to deal with criticisms of the 1980 Hague Convention in the light of this paradigm shift. These criticisms went in a direction opposite to what motivated the Regulation’s drafters, in so far as it was argued that in the light of the changed paradigm the return mechanism of the 1980 Convention was too strict and too mechanistic.

2.4. The response to these significant developments

2.4.1. The response of the European Court of Human Rights

Since the turn of the century, the European Court of Human Rights (ECtHR), in a series of judgments, has ruled that Article 8 on the protection of private and family life of the European Convention on Human Rights (ECHR) establishes positive obligations for States in respect of abduction of children as well as rights of access. The ECtHR repeatedly concluded that Article 8 had been violated when States had not taken effective measures to ensure the return of children. Likewise, the ECtHR frequently rejected claims that return orders violated parents’ rights under Article 8 ECHR.

A new phase started with the ECtHR’s 2010 judgment in Neulinger and Shuruk v. Switzerland. The case concerned the abduction of a child by the mother from Israel to Switzerland. The Swiss lower courts had dismissed the Israeli father’s application for the child’s return because they found that this would involve a “grave risk” for the child under Article 13(1) b) 1980 Convention, but the Federal Court disagreed and ordered the child’s return. The ECtHR ruled that “in the event of the enforcement of the Federal Court’s judgment of 16 August 2007, there would be a violation of Article 8 of the Convention in respect of both applicants”. The Grand Chamber interpreted the child’s right to family life in light of the best interest principle, embodied inter alia in Article 3 CRC and Article 24(2) EU Charter, and considered:

"136. The child’s interest comprises two limbs. On the one hand, it dictates that the child’s ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to “rebuild” the family .... On the other hand, it is clearly also in the child’s interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child’s health and development ... .”

24 ECtHR, Grand Chamber, 6 July 2010 (41615/07).
In its 2013 judgment in *X. v. Latvia*, again concerning an abduction by the mother of a child, in this case from Australia to Latvia, the Grand Chamber clarified the nature and extent of the examination of the family situation to be carried out by the court of refuge when deciding on the child’s return:

"107. ... Article 8 of the Convention imposes on the domestic authorities a particular procedural obligation in this respect: when assessing an application for a child’s return, the courts must not only consider arguable allegations of a “grave risk” for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention. Due consideration of such allegations, demonstrated by reasoning of the domestic courts that is not automatic and stereotyped, but sufficiently detailed in the light of the exceptions set out in the Hague Convention, which must be interpreted strictly... , is necessary. This will also enable the Court, whose task is not to take the place of the national courts, to carry out the European supervision entrusted to it.

108. Furthermore, as the Preamble to the Hague Convention provides for children’s return “to the State of their habitual residence”, the courts must satisfy themselves that adequate safeguards are convincingly provided in that country, and, in the event of known risk, that tangible protection measures are put in place.”

In conclusion: the child’s right to family life interpreted in light of the best interest principle requires a careful, reasoned examination of objections to return, in particular under Article 13(1) b) 1980 Convention. Courts, when ordering return in the event of a known risk, must satisfy themselves that “tangible protection measures” are in place to secure the child’s safety. Return may not be ordered mechanically or automatically.

2.4.2. The response of the Hague Conference

The paradigm shift has also engaged the Hague Conference. It became a prominent theme in discussions on the need for an additional Protocol to the 1980 Convention (initially started to improve on its Article 21 on access). Switzerland submitted a variety of proposals designed to protect abducted children, inspired by the adoption in Switzerland of special provisions on the abduction of children in response, notably, to the case law of the Swiss Federal Court, considered excessively restrictive in its interpretation of Article 13(1) b). After extensive consultations, however, no consensus could be reached on the need for, or desirability of, such a Protocol. The prevailing view, including that of the EU MS, was that most of the problems around the application of the Convention had to do with a lack of compliance with the existing provisions, and efforts should be better directed, among others, to training of judicial and administrative authorities.

In the debate, the importance of the complementary role of the 1996 Convention was recurrently highlighted. Whilst it was recognised that the new paradigm presented challenges, the Sixth Special Commission reviewing the operation of the 1980 (and 1996) Convention (2011-2012) noted:

"41. ... that the 1996 Convention provides a jurisdictional basis, in cases of urgency, for taking measures of protection in respect of a child, also in the context of return proceedings under the 1980 Convention. Such measures are recognised and may be..."
declared enforceable or registered for enforcement in the State to which the child is returned provided that both States concerned are Parties to the 1996 Convention.

42. In considering the protection of the child under the 1980 and 1996 Conventions regard should be given to the impact on a child of violence committed by one parent against the other.

In conclusion: whilst acknowledging the significant changes since the adoption of the 1980 Convention, the Hague Conference has taken the view that these changes should not, at this point, lead to the Convention’s amendment. Rather, accompanying measures are needed, including ratification of the 1996 Convention, which supports the 1980 Convention including by offering effective protection of the child’s safety (cf. infra 2.4.3.(b)).

2.4.3. The response of the EU

Whilst the EU and its Member States have supported the Hague Conference’s approach to the 1980 and 1996 Conventions in response to the new reality of child abductions, discussion within the EU on the possible impact of the changed profiles of the abducting parent and the parent claiming return of the child on the Regulation’s return mechanism has been remarkably limited. The Court of Justice of the European Union (“the Court”) has stressed the mechanism’s role as a deterrent, and as a means to obtain the child’s return without delay, but has not yet been in a position to discuss specific issues relating to the short-term interests of the child (and the taking parent) which may arise in the context of the decision on the return of the child.

(a) Impact of the case law of the European Court of Human Rights

What, then, about the impact on the Regulation of the ECtHR’s case law on the 1980 Convention related above? Here it must be noted that, concerning the Regulation’s return mechanism, the ECtHR has adopted a particular position. The ECtHR has accepted that, when the provisions of Articles 11(8) and 42 Regulation apply, an EU MS notwithstanding a refusal of its courts to order return of a child is under strict obligations, following from its EU membership, to enforce a certified return order issued by the courts of the MS of origin. So, the only way in such a case to lodge a complaint under the ECHR is to do so before the authorities of the MS of origin. Should such action fail, then an application may be lodged with the ECtHR against the MS of origin.

Although the complaint procedure under the ECHR has thus been placed “at distance” by the ECtHR, the fundamental rights protected by the ECHR, in particular its Article 8, remain applicable. Therefore, when a defence is raised based on Article 13(1) b) 1980 Convention in the context of the Regulation, Article 8 ECHR as interpreted by the ECtHR must be respected, since the court of refuge in this case continues to have a certain discretion.

The continued relevance of the ECHR in the Regulation’s context is illustrated by the case of Šneersone and Kampanella v. Italy. In this case, the Italian courts, following a refusal by the courts in Latvia to return a child to Italy, issued a certified order for the child’s return under Articles 11(8) and 42 Regulation. The mother and her son applied to the ECtHR. The


28 As developed since ECtHR, 30 June 2005 (45036/98), Bosphorus Hava Yollan Turizm ve Ticaret Anonim Şirketi v. Ireland; see, recently, ECtHR 25 February 2014, Avotiš v Latvia (17502/07).

29 See CJEU 11 July 2008 (C 195/08), Rinau, paras 47-54.

30 See ECtHR, 18 June 2013 (3890/11), Povse v. Austria.

31 ECtHR, 12 October 2011 (14737/09).
ECtHR found that the Italian courts “had failed to address any risks that had been identified by the Latvian authorities”, and that it was “therefore necessary to verify whether the arrangements for [the child’s] protection listed in the Italian courts’ decisions” were appropriate. The ECtHR established that these arrangements were not adequate, and concluded that Article 8 ECHR had been violated.

The courteous – although not absolute – respect given by the ECtHR to the Regulation’s return procedure is understandable from an institutional standpoint. However, bearing in mind the CRC, the ECHR and the EU Charter of Fundamental Rights, the EU may wish to examine whether the relevant Regulation provisions are, in light of the aforementioned paradigm shift and the responses to it, still adequate, or should, in some respects, be adapted.

(b) Significance of the EU-wide ratification of the 1996 Hague Child Protection Convention

Whilst the 1996 Convention was a primary source of inspiration for the Regulation, it was not yet in force for any of the then MS at the time of its adoption, in contrast to the 1980 Convention, which already applied in all current 28 MS. For several years, ratification of the Convention was blocked by a controversy over its application to Gibraltar, until, in 2008, the Council was finally in a position to authorise joint ratification by all the MS which were not yet bound by it. Today, with one exception (Italy, which is expected soon to ratify), all MS are bound by the Convention.

This means that, as of 2015, the 1996 Convention will apply in the relations between all MS and third States also bound by it, such as Russia. In addition, it will apply, jointly with the 1980 Convention, in the relations between all MS and third States bound by both Conventions, such as Switzerland, Australia or Ecuador, and between such third States and MS that are also bound by the 1980 Convention. The 1996 Convention will also, jointly with the 1980 Convention, apply in the relations between Denmark and the 27 other MS. Finally, its applicable law provisions will apply generally, even in the relations between MS, since the Regulation does not cover the law applicable to parental responsibility.

The 1996 Convention reinforces the 1980 Convention in several respects, including by:

- Emphasising the primary role played by the authorities of the child’s habitual residence in deciding upon any measures to protect the child in the long term, 38

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32 The Court found that the safeguards proposed by the father – who, the Court found, had not seen his son for more than three years and had made no effort to establish contact with him in the meantime – and accepted by the Italian courts, regarding the length and frequency of the periods during which the mother – who, the Court found, was unable to accompany the child to Italy – could stay with the child in Italy, were “a manifestly inappropriate response to the psychological trauma that would inevitably follow a sudden and irreversible severance of the close ties between mother and child”, paras 94-96.
33 It may be noted that before the case was brought before the ECtHR, Latvia had brought an action against Italy before the European Commission under Art. 227 TEC (now Art. 259 TFEU). The Commission, however, opined that the Italian courts had correctly applied the Regulation.
34 At that time, 15 MS had just (on 1 May 2003) signed the 1996 Convention, but none of them was bound by the instrument.
35 Council Decision 2008/431/EC of 5 June 2008 authorising certain Member States to ratify, or accede to, in the interests of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorising certain Member States to make a declaration on the application of the relevant internal rules of Community law (Official Journal L 151 of 11.6.2008). This decision authorised EU MS that had not yet ratified or acceded to the Convention to do so “if possible by 5 June 2008”. This concerned Belgium, Germany, Ireland, Greece, Spain, France, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Finland, Sweden and the United Kingdom.
37 E.g., the accession by Russia to the 1980 Convention has been accepted only by the following MS: Bulgaria, Czech Republic, Croatia, Estonia, Finland, France, Greece, Ireland, Lithuania, Romania, Slovakia, Slovenia and Spain. See also the recent Opinion of the Court, 14 October 2014, 1/13 (and cf. Opinion of 18 December 2014, 2/13).
38 Arts 5 et seq.
Defining with precision the moment when, in the case of wrongful removal, jurisdiction shifts from the court of the prior habitual residence to the court of refuge;  
Providing a jurisdictional basis for any temporary protective measures ordered by the court of refuge (a) when returning a child to the country of habitual residence, (b) to enable contact between the child and the left-behind parent pending return proceedings, and (c) when refusing return in the period foreseen in Article 7(1);  
Providing for the recognition by operation of law and the enforcement of measures of protection, including temporary protection orders until such time as the authorities in the requested State are able themselves to put in place necessary protections.

The imminent EU-wide ratification of the 1996 Convention offers a suitable opportunity to re-visit the Regulation’s provisions where they depart from the 1996 Convention, and the reasons for doing so. In particular, child abduction being a global phenomenon and global instruments being in force for the EU to prevent and combat it, the regional system should only deviate from the global system where it can improve on it in the best interests of the child.
3. REVIEW OF THE REGULATION PROVISIONS ON PARENTAL RESPONSIBILITY – PROPOSALS FOR REFORM

3.1. Jurisdiction – Chapter II of the Regulation

3.1.1. Article 8
Like the 1996 Convention, the Regulation reinforces the primary role of the authorities of the child’s habitual residence (the State of origin) in deciding upon the custody of the child. Article 8, like Article 5 1996 Convention, establishes general jurisdiction for the courts of the habitual residence in matters of parental responsibility. However, Article 8 departs from the 1996 Convention by providing (subject to Arts 9, 10 and 12) that if the court of the habitual residence was seized before the child lawfully moved to another MS, the courts of the first MS retain their jurisdiction. In contrast, under Article 5 1996 Convention (subject to its Art. 7), the authorities of the new habitual residence acquire jurisdiction.

This perpetuatio fori principle offers the advantage of ensuring continuity of domestic proceedings, but it has a price. In the relations between EU MS, as a recent case before the CJEU suggests, it may lead to complex parallel proceedings which may even have repercussions on the question of whether the child’s habitual residence is in one or the other MS. In the relations between EU MS and third States bound by the 1996 Convention, such as Switzerland, it may lead to frictions, because that third State may take the view that with the change of habitual residence to that State, its authorities acquire jurisdiction. On balance, it would seem preferable to realign Article 8, paragraph 1, to Article 5(1) 1996 Convention. This leads to the following Recommendation:

Article 8: Amend paragraph 1 as follows:
The courts of a Member State shall have jurisdiction in matters of personal responsibility over a child who is habitually resident in that Member State (...). Subject to Article 10, in case of a change of the child’s habitual residence to another Member State, the courts of the Member State of the new habitual residence shall have jurisdiction.

3.1.2. Relocation – Proposal for a new provision
While abduction is the unlawful removal of a child from the child’s habitual residence, relocation is the lawful permanent move of the child, usually with the primary carer, to a new country. Increasingly, courts are called upon to deal with relocation cases, for which no specific provision is foreseen in the 1996 Convention or any other binding instrument.

Relocation and abduction are obviously linked, and the fourth Special Commission of the Hague Conference on the operation of the 1980 Convention noted in this regard:

“Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Convention was drafted. It is recognised that a highly restrictive approach to relocation applications may have an adverse effect on the operation of the 1980 Convention.”

43 See CJEU October 2014, C-376/14 PPU, C v M.
44 Art. 8 of the Regulation is subject to Art. 9, which provides, for the specific case where a child moves lawfully from one MS to another MS, that the courts of the former MS retain, in the circumstances indicated, jurisdiction for the purpose of modifying their previously issued ruling on contact (access rights) during three months. As this provision only works in the relations between MS and is limited in time, it does not raise the issues to which Art. 8 gives rise. It is a useful provision that makes quick adaptations to a move of a child to a new MS possible.
It would seem important, therefore, to include in Chapter II of the Regulation a rule for court decisions on relocation—which are, contrary to abduction orders, decisions on the merits—before the provisions on abduction. The following is a Recommendation for such a provision, respecting the fact that courts will decide on the basis of their internal laws:

**Article 9A Relocation**

1. A court to which an application for the relocation of a child is made shall, while considering all relevant factors in its examination, give primary consideration to the best interests of the child.

2. It shall ensure that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. The court shall act expeditiously. Before issuing its judgment, the court shall first examine whether the parties are willing to engage in mediation to find, in the interest of the child, an agreed solution.

3.1.3. Article 10 – Proposal for a new Article on protective measures

Article 8 Regulation is subject to Article 10 on jurisdiction in cases of child abduction. Article 10, like Article 7(1) 1996 Convention, determines when, in case of abduction, jurisdiction switches from the courts of the MS of origin to those of the MS of refuge.

However, in a major departure from the 1996 Convention, Article 10 Regulation does not include the equivalent of Article 7(3) 1996 Convention, nor does the Regulation provide for the equivalent of Article 11 of that Convention referred to in Article 7(3). Under the 1996 Convention, where the court of refuge orders return subject to certain undertakings by the parties or to protective measures “as are necessary for the protection of the person or property of the child”, these orders will be urgent measures under its Article 11. They must be recognised and enforced under Chapter IV of the Convention, and remain effective until the court of origin has taken “the measures required by the situation”.

As practice under the 1980 Convention has shown, without this enforcement obligation, undertakings and protective measures will often not be respected and remain ineffective. This has given rise to the need to obtain mirror or safe harbour orders in the State of origin, but these may not always be available, or, again, not be effective. Articles 7(3) and 11 1996 Convention, therefore, strongly reinforce the return mechanism of the 1980 Convention. The court of refuge’s urgency jurisdiction empowers that court to take effective urgent measures of protection where this seems necessary.

In contrast, under Article 20 Regulation, the court of refuge may take protective measures under its own laws, if those laws so provide. However, (1) the Regulation does not provide itself a jurisdictional basis for such measures and (2) any measures taken under national law are not covered by its Chapter III. There is, therefore, as the CJEU has concluded, no obligation for the State of origin to recognise or enforce such measures.

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46 Because Art. 9A precedes Art. 10, and since no reference to Art. 9A is included in Art. 8(2), jurisdiction lies with the court of the habitual residence of the child, subject to Art. 12.

47 The draft is inspired by the draft Recommendation prepared by the European Committee on Legal Co-operation of the Council of Europe and submitted to its Committee of Ministers with a view to its adoption in early 2015. Para. 3, second sentence, is inspired by the proposed addition to Art. 11(3), see infra 3.1.6.

48 See, e.g., Schuz (supra, fn. 23) 30-33.

49 And, moreover, provided that not only the child in need of protection but also all other persons concerned are present in the MS of the court taking the provisional measures (emphasis added), CJEU 2 April 2009 (C-523/07), Detiček.

50 CJEU 15 July 2010 (C-256/09), Purrucker I.
This is problematic and may be counterproductive. In particular, when the court of refuge, under Article 11(4) Regulation, must determine “that it is established that adequate arrangements have been made to secure the protection of the child after his or her return”, it will, in the absence of a solution agreed among the parents, depend on any measures taken by the court of origin. The effect may well be that, failing such measures, the court of refuge may, out of (abundance of) caution, refuse the child’s return.

That the lack of provisions similar to Articles 7(3) and 11 1996 Convention is a real gap in the Regulation may be illustrated by a recent judgment of the UK High Court51. In this case the father had applied under the 1980 Convention and the Regulation for the return to Lithuania of a child wrongfully removed to the UK by the mother. The mother raised several defences, including the exception of a grave risk of harm to the child. The High Court, while ordering the return, imposed, pursuant to Article 11 of the 1996 Convention, a number of “safeguards...which will ensure that there is no risk as mentioned in Article 13 (b), so that defence will not be available”52.

The application of Article 11 1996 Convention by the High Court seems incompatible with Article 61 Regulation53. Yet, this case brings out the advantages of Article 11 1996 Convention:

- It may help avoid lengthy procedural debates regarding burden of proof and evidence,
- It enables the court of refuge to make itself, at least initially, “adequate arrangements... to secure the protection of the child after his or her return” (Art. 11(4)), without awaiting such measures to be taken by the court of origin; indeed, it may encourage the court of origin to take such measures, and thus facilitate coordination and cooperation between the court of refuge and the court of origin, and thereby,
- It will help reduce the need for an order refusing return.

In relation to protective measures taken under Article 20 Regulation, the CJEU has ruled that “in so far as the protection of the best interests of the child so requires, the courts having taken the protective measures must inform directly or through the central authority designated under Article 53 Regulation, the court of another Member State having jurisdiction”54. This will further stimulate cooperation between the courts of refuge and of origin, and it seems therefore useful to add this, both to the proposed new paragraph 2 of Article 10 and the proposed new Article 15A. This leads to the following Recommendations:

**Article 10**: Add a new paragraph:

2. So long as the courts first mentioned in paragraph 1 keep their jurisdiction, the courts of the Member State to which the child has been removed or in which he or she has been retained can only take such urgent measures under Article 15A as are necessary for the protection of the person or property of the child. In so far as the protection of the best interests of the child so requires, the courts having taken the protective measures must inform directly or through the central authority designated under Article 53, the courts first mentioned in paragraph 1.

51 B v B [2014] EWHC 1804 (Fam).
52 These safeguards included a restriction of contact (“in light of the admissions of violence made by the father”), an order prohibiting the father from molesting the mother and from approaching her flat in Lithuania where she would live with the child. These safeguards being put in place, the mother was ordered to return the child within three weeks. She was given those three weeks to obtain an urgent interim hearing in the Lithuanian court which might allow her to stay in the UK.
53 Practice Guide for the application of the Brussels Iia Regulation (revised version 2014), 89.
54 CJEU 2 April 2009 (C-523/07), A (ruling No 4).
Following Article 15, insert a new Article:

**Article 15A** Provisional, including protective, measures

1. In all cases of urgency, the courts of any Member State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection. In so far as the protection of the best interests of the child so requires, the court having taken the protective measures must inform directly or through the central authority designated under Article 53, the court of another Member State having jurisdiction.

2. The measures taken under the preceding paragraph with regard to a child habitually resident in a Member State shall cease to apply as soon as the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

The introduction of these Articles makes Article 20 redundant, therefore:

**Article 20: to be deleted.**

3.1.4. Article 11(2)

Article 11(2) Regulation provides that, when applying Articles 12 and 13 1980 Convention, it shall be ensured that the child is given the opportunity to be heard, unless the child’s age or maturity makes this inappropriate. The principle of a mandatory hearing of a child of an appropriate age and sufficient maturity is an important expansion of the provision in the 1980 Convention that the return may be refused if “the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views”. Article 11(2) Regulation was inspired by Article 12 CRC (*supra* 2.3.1.).

Article 11(2) obliges the authorities to enable children to make their views known not only when the child objects to being returned but generally when decisions are made under Articles 12 and 13 1980 Convention. In the context of abduction proceedings, it is particularly important to ensure the child’s hearing at the stage of the return proceedings by the court of refuge, even if the court does not accept to follow the child’s views. Returning the child without at least considering the child’s views is to treat him or her “like a chattel who can be moved around at will by adults”55.

Where the parents cannot or may not represent the child, but also in other situations, it is important that the child of sufficient understanding is assisted by a special representative, who may provide information to the child, including on the consequences of compliance with his or her views, and may present the views of the child to the court56. It would seem important, following the provisions of the *European Convention on the Exercise of Children’s Rights*, to add a provision to this effect to Article 11(2). This leads to the following Recommendation:

**Article 11(2):** add a second sentence:

In so far as the protection of the best interests of the child so requires, the court shall appoint a special representative for the child, to provide the child with information, and to present the child’s views to the court.

3.1.5. Article 11(3)

The need to handle applications for return of a child expeditiously remains a pressing concern regarding return proceedings under the 1980 and 1996 Conventions as well as the Regulation. Article 11(3), setting up a maximum period of six weeks, save in exceptional circumstances, for obtaining a decision after the application is lodged is, therefore, a helpful

55 Schuz (*supra* fn. 23) 387. Taking into account the child’s views may already be critical when it comes to the decision on the child’s habitual residence, which may be decisive for the question whether there is wrongful removal or retention in the sense of Art. 10 Regulation (and Arts 3 and 4 1980 Convention) in the first place.

reinforcement of the more indicative six weeks found in Article 11 1980 Convention. Although research suggests that meeting the six weeks’ time limit remains a considerable challenge for many courts\(^5\), court practice in a few MS demonstrates that with sufficient efforts and resources, it is generally possible to deal with an application in one instance. However, the provision should be further elucidated and strengthened in two respects: as regards (a) appeal proceedings, and (b) the central authority’s intervention.

(a) Article 11(3) does not specify whether the six-week period includes the situation where the court of first instance renders a judgment that is not enforceable because an appeal decision is required to obtain an enforceable order. It seems unrealistic to assume that first and second instance proceedings can be concluded together within six weeks. But it would not seem unreasonable to expect appeal proceedings, leading to an enforceable decision, to be completed within six weeks following the decision of the court below\(^6\).

(b) Often in abduction cases, the left-behind parent will request the assistance of central authorities. Their crucial role is highlighted by the 1980 Convention. Whilst the general duty of Contracting States “to use the most expeditious procedures available”\(^7\) also applies to central authorities, the Convention does not specify any delays for their actions. See infra, 3.4., for a proposed addition to Article 55.

3.1.6. Mediation – Proposal for a new provision

There is now increasingly broad recognition that solving family law disputes, including concerning children, by agreement and in particular through mediation, may bring great advantages\(^8\). Both the Regulation (in Art. 55(e)) and the 1996 Convention (Art. 31 b)) require central authorities to facilitate agreed solutions through mediation or similar means for the protection of the child. In recent years, the crucial importance of mediation in child abduction cases has come more and more to the forefront. The Guide to Good Practice on Mediation developed by the Hague Conference summarises these advantages as follows:

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"a In the context of international child abduction, mediation between the left-behind parent and the taking parent may facilitate the voluntary return of the child or some other agreed outcome. Mediation may also contribute to a return order based on the consent of the parties or to some other settlement before the court.
b Mediation may also be helpful where, in a case of international child abduction, the left-behind parent is, in principle, willing to agree to a relocation of the child, provided that his / her contact rights are sufficiently secured. Here, an agreed solution can avoid the child being returned to the State of habitual residence prior to a possible subsequent relocation.
c In the course of Hague return proceedings, mediation may be used to establish a less conflictual framework and make it easier to facilitate contact between the left-behind parent and the child during the proceedings.
d Following a return order, mediation between the parents may assist in facilitating the speedy and safe return of the child.\(^9\)
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5\(^7\) See Lowe (supra fn. 21) VI.6.
5\(^8\) This is now the practice in some MS, e.g., the Netherlands. As a result, MS where first instance decisions are not enforceable pending appeal would either have to expedite appeal proceedings or to introduce a possibility for enforcement pending appeal.
5\(^9\) 1980 Convention, Art. 2.
Mediation in the context of return proceedings may, therefore, lead to considerable financial and emotional cost saving. Courts in some MS will now, in an early stage of the return proceedings, and, importantly, without prejudice to the expeditious handling of return proceedings, examine whether the parties are willing to engage in mediation. Where possible, this practice should be a part of the proceedings in the application of the Regulation. This leads to the following Recommendations:

**Article 11(3):** Insert a new subparagraph following the first subparagraph:

**Before issuing its judgment, the court shall first examine whether the parties are willing to engage in mediation to find, in the interest of the child, an agreed solution.**

And amend the final subparagraph:

Without prejudice to the previous subparagraphs, the court shall, except where exceptional circumstances make this impossible, issue its enforceable judgment no later than six weeks, or, if a judgment in appeal is required to obtain such an enforceable order, no later than twelve weeks after the application is lodged.

**3.1.7. Article 11(4)**

According to Article 11(4), “A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return”. This provision properly emphasises the need to ensure the safety of the child before the return is ordered. It is not enough, of course, that the possibility of making such arrangements exists in abstracto in the State of origin: concrete measures must be in place for the child’s safety.

However, there are some difficulties with this provision, in particular: who has the burden of proof and what kind of evidence must be produced, in the context of what is in essence a summary procedure, that any protective measures are indeed adequate? Is it for the left-behind parent to demonstrate that protective measures have been taken, or for the abducting parent to show that such measures have not been taken? Negative proof, specifically that the requesting State will not enforce legal arrangements against domestic violence, is usually difficult. Or is it up to the court of refuge to determine whether the measures are adequate? There is an ambiguity here that is not in the interest of promoting the child’s prompt and safe return.

It does not help, further, that the court of refuge does not find in the Regulation the jurisdictional basis to order urgent, including protective, measures that are enforceable in the MS of origin. It depends for its determination on “adequate arrangements” having been made on the parties and any measures taken by the court of origin.

Here, the addition of provisions equivalent to Articles 7(3) and 11 1996 Convention (proposed supra 3.1.3.) will bring relief. They will reduce procedural debates regarding burden of proof and evidence, because the provisional measures may be taken in response to what appears like a serious defence without necessarily engaging in an – often problematic – in-depth examination of the alleged facts. Moreover, as noted, a court of refuge, empowered to take itself measures of protection, is more likely to order return of the child, even in the face of allegations of grave risk or objections of the child, because it has the possibility to provide additional security when ordering the child’s return, and will be more motivated to cooperate with the court of origin. The courts will benefit regarding

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Nos 49-64. The guide has been translated into all the official languages of the European Union thanks to the support of the European Commission.

62 **Practice Guide** (supra, fn. 53), 55. This leaves the question, however, whether such measures will or can be taken before the child is returned and is back in the MS of origin.
such cooperation from the European Judicial Network, and it may be useful also to refer here to the EJN, mentioned in the context of the general functions of the central authorities (Art. 54). **Recommendation:**

**Article 11(4)**

A court cannot refuse to return a child on the basis of Article 13(1) b) of the 1980 Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. **To this end, the court shall, where appropriate, use the European Judicial Network in civil and commercial matters created by Decision No 2001/470/EC.**

**3.1.8. Article 11(6)-(8)**

Under Article 11(6)-(8), the court of refuge, when refusing return pursuant to Article 13 1980 Convention, must immediately transmit a copy of the order and relevant documents to the court of origin. This information must then be notified to the parties with an invitation to make submissions to the court within three months (if they have not already done so). “Notwithstanding a judgment of non-return” any subsequent judgment issued (in particular) by the court of origin which requires the return of the child is then enforceable “without any possibility of opposing its recognition” when certified by the court of origin under Article 42. This court must take into account in issuing it judgment the reasons for and evidence underlying the refusal order pursuant to Article 13 of the 1980 Convention.

Under the 1996 Convention, a final decision on the child’s custody taken by the court of origin may also imply the return of the child, and that decision is, under Chapter IV of the Convention, to be recognised and enforced, in “a simple and rapid procedure” (Art. 26(2)) by the State of refuge, notwithstanding a prior refusal to return the child taken by the court of refuge. However, the Regulation’s procedure departs significantly from the 1996 Convention, in so far as it turns the court of origin into a “second instance” regarding the return refusal by the court of refuge. The court of origin is given the power, when it disagrees with the court of refuge on the non-return, to “trump” the latter’s refusal. This amounts to judicial review, not by a higher court in the same MS, but by a court of another MS. There are several problems with this rule:

(a) The introduction of a judicial review, not by a higher court in the same MS, but by a court of another MS, is alien to “the principle of mutual trust which underpins the Regulation”\(^\text{63}\). As we have seen, return refusals under the 1980 Convention are very limited in number. Moreover, return decisions are difficult decisions, and if a court of a MS decides, perhaps after hearing the child, a guardian ad litem, the parents, and a psychologist, to refuse return, that decision must be presumed not to have been taken lightly. Indeed, according to the ECtHR, the decision on the child’s return under Article 13 1980 Convention should be a careful, well-motivated decision (supra 2.4.1.). If it is based on the child’s objections (Art. 13(2)) the court will have duly considered them. Where the refusal is based on Article 13(1) b), the court must be convinced that returning the child would expose it to “grave risk”. That decision should in principle be respected by the court of origin as long as that court has not decided, on the basis of a full examination of the child’s best interests, on the custody issue. After all:

(b) The proper role of the court of origin is not to review (the reasons given for) the return refusal, but to decide on the custody issue. That decision may imply the child’s return and, in that case, must be recognised and enforced in the MS of refuge. However, orders on return, made by the court of refuge, and on custody, rendered by the court of origin, are

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\(^{63}\) CJEU 1 July 2010 (C-211/10 PPU), Povse, para. 59.
distinct decisions – one dealing with the short-term risks attached to the return, the other dealing with the child’s long-term best interests. As the CJEU has recently recalled:

“... an action [based on Article 12 of the 1980 Convention and Articles 10 and 11 of the Regulation], whose object is the return, to the Member State of origin, of a child who has been wrongfully removed or retained in another Member State, does not concern the substance of parental responsibility and therefore has neither the same object nor the same cause of action as an action seeking a ruling on parental responsibility (...). Further, according to Article 19 of the 1980 Hague Convention, a decision under that convention concerning return is not to be taken to be a determination on the merits of any custody issue. There can therefore be no lis pendens between such actions.”

(c) As such, the idea of Article 11(6)-(7), that the court of refuge should promptly inform the court (or central authority) of origin of its refusal, and that the parties are then invited to make submissions to the latter court, “so that the court can examine the question of custody of the child” (para. 7, emphasis added), makes sense, in particular when that court has already been seized by one of the parties. This will expedite the final decision on custody, and it may be useful for the court to be informed of the reasons for the court of refuge’s refusal. However, in its Povse judgment of 1 July 2010, the Court ruled that Article 11(8) must be interpreted as covering “a judgment, even if it is not preceded by a final judgment on custody and parental responsibility”.

As the Court itself admits, this “interpretation might lead to the child being moved, needlessly, if the court ... were ultimately to award custody to the parent residing in the Member State of removal”. But, in the Court’s view, the arguments in favour of this interpretation outweigh its disadvantages. With full understanding for the specific difficulty of the Povse case, it is submitted that any needless risk of a tossing back and forth of the child should be avoided. Such a forced return order is appropriate if it is made after a full examination of the merits, and, therefore, in combination with a custody order. Consequently, Article 11(6) and (8) should be clarified to the effect that it is not the court of origin’s role to review the refusal to return the child, but to examine the merits, and in the context of that examination, to come to a decision on the child’s custody which may imply the child’s return.

In theory, it would be conceivable, as in the Commission’s proposal of May 2000 – which was not accepted (supra 2.2.) – to lay the powers to decide both on the return and on the custody of the child in the court of origin’s hands, thus eliminating altogether (the role of) the court of refuge. But that would even further upset the delicate balance between the two forums.

This would be particularly ill-advised in the light of the changed profile of the taking parent and the left-behind parent, which may lead to more situations than in the past where the safety of the child needs to be examined. And this should, in the best interests of the child, preferably be done by the court closest to the child and where appropriate in cooperation with the court of origin. The ECtHR, as we have seen, has also accentuated the role of the court of refuge considering the right of the child to protection under Article 8 ECHR. This leads to the following Recommendations:

**Article 11(6):** Amend as follows:

If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in

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64 CJEU 9 October 2014, C-376/14 PPU, C v M, para. 48.
65 CJEU 1 July 2010 (C-211/10 PPU), Povse, second ruling, and see paras 51-67 (emphasis added).
66 “the importance of delivering a court judgment on the final custody of the child that is fair and soundly based, the need to deter child abduction, and the child’s right to maintain on a regular basis a personal relationship and direct contact with both parents, take precedence over any disadvantages which such moving might entail” (para. 63).
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particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law, for that court’s information. The court shall receive all the mentioned documents within one month of the date of the non-return order.

Article 11(8): Amend as follows, and see suggestion below in respect of Article 42:

Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment on the question of custody which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with (...) Chapter III below in order to secure the return of the child.

The mechanism of Article 11(6)-(8) combined with Article 42 Regulation results in an automatic return of the child. We will address this aspect infra 3.3.

3.2. The law applicable to parental responsibility – Proposal to add a new Chapter IIA referring to Chapter III of the 1996 Convention

The Regulation does not deal with the law applicable to parental responsibility. However, it is understood that this gap is filled by the applicable law rules contained in Chapter III (Arts 15-22) 1996 Convention, for the MS parties to this Convention. This follows, but rather indirectly, from Article 62(1) combined with Article 61 Regulation67. Now that all MS will finally be bound by the Convention, it is timely to include an express reference in the Regulation to the applicable law provisions contained in the Convention. This will remind the courts of MS, more clearly than the present text does, to apply those rules when exercising their jurisdiction according to the Regulation.

In particular, this will help remind courts, accustomed to applying the law of the child’s nationality to issues of parental responsibility, to apply instead the law of the child’s habitual residence (Art. 15(1)); and to apply the law of the child’s new habitual residence and not the law that applied before that change (Art. 15(3)); and not to overlook Article 16, in particular its paragraphs 3 and 4 (and Art. 21), which provide solutions for the attribution of parental responsibility in the event of a change of the child’s habitual residence to another State. As “in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration” (Art. 24(2) EU Charter), a clear reference to Chapter III 1996 Convention would be fitting.

It would therefore be appropriate to include in the Regulation, between Chapters II (Jurisdiction) and III (Recognition and Enforcement), a new Chapter IIA (Applicable Law to parental responsibility), consisting of one Article, Article 20A. Recommendation: insert:

- CHAPTER IIA – LAW APPLICABLE TO PARENTAL RESPONSIBILITY

Article 20A

The law applicable to parental responsibility shall be determined in accordance 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 Convention), in particular its Chapter III (Applicable Law) (Articles 15-22). The reference in Article 15, paragraph 1, of that Convention to “the provisions of Chapter II” shall be read as “the provisions of Chapter II, Section 2, of this Regulation”.

67 The Practice Guide (supra, fn. 53), 89, is more explicit: “... the Convention applies in relations between Member States in matters of applicable law, since this subject is not covered by the Regulation”.

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This technique has a precedent in *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*, Chapter III, Article 15. This method has been well received. In the case of our Regulation it is all the more justified as all EU Member States will soon be bound by the 1996 Convention.

### 3.3. Recognition and enforcement – Chapter III of the Regulation

The provisions of Chapter III, Sections 1-3, on recognition and enforcement of judgments in matters of parental responsibility are comparable to those of Chapter IV 1996 Convention. Their efficiency is enhanced by the prohibition of review of jurisdiction of the court of origin: Article 24 – in contrast to Article 23(2) a) 1996 Convention, which does allow such a review. Moreover, the Regulation provides that the decision on enforceability shall be taken without delay, and without any possibility for the person against whom enforcement is sought, nor the child, to make any submissions on the application (Art. 31).

Furthermore, according to the Court,

> "in order to ensure that the requirement under Article 31 of the Regulation that there be no delay cannot be undermined by the suspensive effect of an appeal brought against a decision on a declaration of enforceability [under Arts 33 and 34], it is appropriate... that the Regulation be interpreted as meaning that a placement order is to become enforceable at the point in time when the court of the requested Member State declares, in accordance with Article 31, that that order is enforceable".

While this ruling applied to a placement order made under Article 56 of the Regulation, the justification given, namely that "decisions should be made that respect the criterion of the best interests of the child, in the light of Article 24 of the Charter", would seem to apply to all cases where those interests would be at risk as a result of the suspensive effect of appeal proceedings.

The result is a system that provides for an effective, rapid procedure, combined with a possibility to apply for a decision not to recognise or enforce the decision (Art. 21(3) and Art. 31(2)) for one of the reasons specified in Article 23 (and Art. 24). The grounds for refusal provided in Article 23 are needed, in exceptional cases, to protect the best interests of the child and fundamental procedural safeguards. They cannot be missed, and the idea of abolishing these checks and balances altogether cannot be supported. On the contrary, Section 4, which abolishes exequatur for a limited category of judgments, is problematic.

#### 3.3.1. Section 4 – Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child

Section 4 goes even further beyond the 1996 Convention, as it eliminates the need for a declaration of enforceability and excludes the possibility of opposing recognition of judgments on rights of access, and on return of a child pursuant to Article 11(8) (Art. 40). It gives the left-behind parent an option *in addition* to the procedure of sections 1-3 (Art. 40).

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68 The Chapter is entitled "Determination of the applicable law" and Art. 25 reads: "The law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations ... in the Member States bound by that instrument."

69 Arts 21(2) and 22 apply to matrimonial matters only.

70 CJEU 26 April 2012 (C-92/12 PPU), Health Service Executive/S.C. E.C., paras 119-133.

71 Thus understood, and with the proviso that the actual enforcement laws of the EU MS remain untouched, the system may be characterised as providing for "near-automatic recognition and enforcement", Advocate General Sharpston in her Opinion before CJEU 15 July 2010 (C-256/09), Purrucker I, point 175.

Article 41

The 1980 Convention, which essentially provides for assistance in securing the exercise of access rights through the Central Authority framework (Art. 21), offers only limited protection of these rights. The 1996 Convention, on the other hand, provides for jurisdiction of the courts to order access, also pending return proceedings or after refusal of return, and for recognition and enforcement of access orders, even in advance of the move of the child (Art. 24). The Regulation’s procedure under sections 1-3 of Chapter III reinforces recognition and enforcement even further.

The effect of the certificate delivered under Article 41 is that, save subparagraph (e) of Article 23 (see Art. 47 in fine), none of the exceptions of Article 23 can be invoked, not even on behalf of the child. This goes far, but given that access usually involves regular short-term visitations, and in light of the importance of securing personal relationships and personal contact between the child and his or her parents, on balance, the rule probably constitutes progress.

Article 42

On the other hand, Article 42 is problematic. Expressly written for the – exceptional – case where the court of refuge has refused return, it enables the holder of the certificate issued by the court of origin to enforce that court’s “trumping” return order in the MS of refuge. And this, as the Court has ruled, also in the case of “a judgment, even if it is not preceded by a final judgment on custody and parental responsibility”73. None of the exceptions of Article 23 can be invoked, not even on behalf of the child. That goes far in the case of access, but there it is in the context of short, regular, periods of contact. In contrast, here the judgment may entail the definitive move of the child to the other MS.

Moreover, the certified judgment may be declared enforceable notwithstanding appeal, and as there is no time limit to the certificate’s validity, appeal in the MS of origin, including on the child’s behalf, may be no longer possible when the certificate holder does not immediately present the judgment for enforcement. The result may be that in case of changed circumstances no remedy is available, except perhaps, as a situation of heavy conflict in extremis, under the enforcement laws of the MS of enforcement (Art. 47).

That the system of Articles 11(8) and 42 can work out in an overly rigid manner is illustrated by the case CJEU 22 December 2010 (C-491/10 PPU) (Aguirre v Pelz). In this case the German authorities refused the return to Spain requested by the father of a child retained by her mother in Germany following a visit, after the child had expressed strong objections against her return before the German court. The Spanish court then gave the father custody of the child and certified its decision according to Article 42, but made its order without hearing mother and child. This led the German courts to submit to the Court the question whether such a certified decision must be automatically enforced, even if it manifestly violates the fundamental right of the child to be heard. The Court ruled that

“the court with jurisdiction in the Member State of enforcement cannot oppose the enforcement of a certified judgment, ordering the return of a child who has been wrongfully removed, on the ground that the court of the Member State of origin which handed down that judgment may have infringed Article 42 ... interpreted in accordance with Article 24 of the Charter of Fundamental Rights, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin.”74

73 Cf. supra, 3.1.8.
74 CJEU 22 December 2010 (C-491/10 PPU), Aguirre v Pelz.
The only remedies available, therefore, are those provided by the MS of origin. This even applies when the certificate contains errors\textsuperscript{75}.

All in all, the system of Articles 11(8) and 42, would seem –
- To be based on assumptions which are open to some doubt (cf. supra 2.2.);
- To be disproportionate in comparison to the procedure applicable under the Regulation to return orders not given pursuant to Article 11(8) (Chapter III sections 1-3);
- To raise questions concerning safeguards for the child’s safety;
- Not to be necessary as the procedure under Chapter III sections 1-3 is also available\textsuperscript{76}.

Article 42 would best be deleted. In any event – if it were maintained – Article 11(8) should be redrafted so as to eliminate any doubt that any judgment referred to in Article 42(1), second sentence, that orders the return of a child notwithstanding a judgment of non-return pursuant to Article 13 1980 Convention, can only be a judgment on the custody of the child (supra 3.1.8.). This leads to the following Recommendation:

**Article 42: to be deleted.**

### 3.4. Cooperation between Central Authorities in matters of parental responsibility - Chapter IV of the Regulation

**Article 55**

In addition to the time limit proposed for appeals in return proceedings (supra 3.1.5.), it would seem desirable to add a time limit for the action of central authorities in the preparatory stage. Of course, the central authority in the State of refuge will often be dependent on further action on the part of the central authorities of other MS or a parent or even third persons, including social workers, psychologists and other experts. Central authorities may, sometimes, have even greater difficulties than courts to respect any time limit. Nevertheless, it would seem inconsistent to impose an express six weeks rule save exceptional circumstances on courts, and not to provide a similar rule for central authorities.

This leads to the following Recommendation:

**Article 55: Add a new paragraph:**

(f) ensure that where they initiate or facilitate the institution of court proceedings for the return of children under the 1980 Convention, the file prepared in view of such proceedings, save where exceptional circumstances make this impossible, is complete within six weeks.


\textsuperscript{76} Moreover, further research will be needed to prove the system’s effectiveness in practice. In the case of Aguirre v Pelz, it appears that, in January 2015, the child is still in Germany.
CONCLUSION

It is hoped that the proposed amendments – which do not affect the essence of the Regulation’s parental responsibility provisions – will have a double-positive effect. They should adapt the Regulation to the significant legal and sociological changes that have occurred in recent years, and they should harmonise the intra-EU child protection system and the regime governing the relations of EU Member States with third States (and Denmark) Parties to the 1980 Child Abduction and 1996 Child Protection Conventions.

In any event, much will continue to depend on the application of the Regulation in practice. The successful location of children, effective attempts to bring about voluntary return and contact, in particular through mediation, enforcement of foreign measures in the final stage – governed by national law – and many other aspects remain essential. In particular, strong, well-resourced, proactive central authorities are an absolute requirement for the proper operation of the Regulation; real progress here will require that the EU agrees on minimum standards in relation to resourcing central authorities and their staff. Both centralisation and specialisation of courts, which should make good use of the European Judicial Network, are also highly desirable.
ANNEX – SUMMARY OF RECOMMENDATIONS

CHAPTER I – JURISDICTION

Article 8: Amend paragraph 1 as follows:
The courts of a Member State shall have jurisdiction in matters of personal responsibility over a child who is habitually resident in that Member State (...). Subject to Article 10, in case of a change of the child’s habitual residence to another Member State, the courts of the Member State of the new habitual residence shall have jurisdiction.

Following Article 9: Add a new Article:

Article 9A Relocation
1. A court to which an application for the relocation of a child is made shall, while considering all relevant factors in its examination, give primary consideration to the best interests of the child.
2. It shall ensure that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.
3. The court shall act expeditiously. Before issuing its judgment, the court shall first examine whether the parties are willing to engage in mediation to find, in the interest of the child, an agreed solution.

Article 10: Add a new paragraph:

2. So long as the courts first mentioned in paragraph 1 keep their jurisdiction, the courts of the Member State to which the child has been removed or in which he or she has been retained can only take such urgent measures under Article 15A as are necessary for the protection of the person or property of the child. In so far as the protection of the best interests of the child so requires, the courts having taken the protective measures must inform directly or through the central authority designated under Article 53, the courts first mentioned in paragraph 1.

Article 11(2): Add a second sentence:

In so far as the protection of the best interests of the child so requires, the court shall appoint a special representative for the child, to provide the child with information, and to present the child’s views to the court.

Article 11(3): Insert a new subparagraph following the first subparagraph:

Before issuing its judgment, the court shall first examine whether the parties are willing to engage in mediation to find, in the interest of the child, an agreed solution.

And amend the final subparagraph:

Without prejudice to the previous subparagraphs, the court shall, except where exceptional circumstances make this impossible, issue its enforceable judgment no later than six weeks, or, if a judgment in appeal is required to obtain such an enforceable order, no later than twelve weeks after the application is lodged.

Article 11(4)

A court cannot refuse to return a child on the basis of Article 13(1) b) of the 1980 Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return. To this end, the court shall, where...
appropriate, use the European Judicial Network in civil and commercial matters created by Decision No 2001/470/EC.

Article 11(6): Amend as follows:

If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law, for that court's information. The court shall receive all the mentioned documents within one month of the date of the non-return order.

Article 11(8): Amend as follows, and see suggestion below in respect of Article 42:

Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment on the question of custody which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with (...) Chapter III below in order to secure the return of the child.

Following Article 15, add a new Article:

Article 15A Provisional, including protective, measures

1. In all cases of urgency, the courts of any Member State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection. In so far as the protection of the best interests of the child so requires, the court having taken the protective measures must inform directly or through the central authority designated under Article 53, the court of another Member State having jurisdiction.

2. The measures taken under the preceding paragraph with regard to a child habitually resident in a Member State shall cease to apply as soon as the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.

Article 20: to be deleted.

Following Chapter I, add a new Chapter:

• CHAPTER IIA – LAW APPLICABLE TO PARENTAL RESPONSIBILITY

Article 20A

The law applicable to parental responsibility shall be determined in accordance 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 Convention), in particular its Chapter III (Applicable Law) (Articles 15-22). The reference in Article 15, paragraph 1, of that Convention to “the provisions of Chapter II” shall be read as “the provisions of Chapter II, Section 2, of this Regulation”.

• CHAPTER III – RECOGNITION AND ENFORCEMENT

Article 42: to be deleted.

• CHAPTER IV – COOPERATION BETWEEN CENTRAL AUTHORITIES IN MATTERS OF PARENTAL RESPONSIBILITY

Article 55: Add a new paragraph:
(f) ensure that where they initiate or facilitate the institution of court proceedings for the return of children under the 1980 Convention, the file prepared in view of such proceedings, save where exceptional circumstances make this impossible, is complete within six weeks.

**Biography**

**Hans van Loon** has been at the forefront of private international law for well over a quarter of a century. Secretary General of the Hague Conference on Private International Law from 30 June 1996 until 30 June 2013, he steered the Organisation during a time of global expansion and transformation. He has been involved in the development of nine Hague Conventions, two of which are fast approaching 100 Contracting States, as well as the revision of the Statute of the Hague Conference. In his time as Secretary General, he has seen the Organisation’s membership grow from 44 to 72 Members (with more than 60 non-Member States now party to at least one Hague Convention), which has turned the Hague Conference into a veritable world organisation. He studied law and sociology at the University of Utrecht, and international law and international relations at the University of Leiden and at the Graduate Institute of International Studies, Geneva (1966-1973). Following a traineeship with the Council of Europe (European Commission of Human Rights), he was admitted to the Bar in The Hague and practiced law with the Supreme Court of the Netherlands, acting also before the European Court of Human Rights (case of Winterwerp v. The Netherlands, 1979, 1981). Hans van Loon is a *doctor honoris causa* of the University of Osnabrück (Germany, 2001), an Associate Member of the *Institut de Droit International* (since 2009), a Member of the European Group of Private International Law since its inception (1991), and an honorary Member of the *Asociación Americana de Derecho Internacional Privado* (ASADIP, 2007).
Session II - Cross border families and families crossing-border

_Name Law - is there a need to legislate?_

_Paul Lagarde_

The Committee on Legal Affairs of the European Parliament (JURI) has requested an in-depth analysis on surnames, to be presented at the Civil Justice Forum which will be attended by national parliaments. This study focuses on the problems that arise in relation to the law on names as a consequence of the free movement of citizens of the European Union - situations involving transnational couples, the parents of children born in different Member States and their nationality, and so on. By presenting recent decisions of the Court of Justice of the European Union, it underlines its impact on national legislation. In addition, it reflects on whether it might be necessary to legislate at European level.
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EXECUTIVE SUMMARY

The right of all citizens of the European Union to move and reside freely within the territory of the Member States, affirmed by Article 21 of the TFEU, implies that it is possible to have the same name in all of these States. Currently, this is not the case, due to the diversity of laws on this subject, both in the form of civil law and private international law. The name assigned in one Member State in accordance with the law of that State is not always recognised in another Member State applying a different law.

This study starts by looking at the broad picture of diversity of the laws of the Member States, both in terms of their civil law and their private international law. It then examines the reaction of the European Court of Human Rights and the Court of Justice of the European Union to this situation, and then looks at the present state of international law emanating from the United Nations organisation, the Council of Europe and the International Commission on Civil Status. Finally, it evaluates the different methods that could be employed within the framework of European legislation. In this respect, it rules out the possibility of a substantive unification of the law on names and does not consider the unification of the rules on conflicts of law to be a priority, favouring recognition as the method of choice. The study concludes by proposing legislation aimed at the mutual recognition of names recorded in the civil registers in the Member States.

GENERAL INFORMATION

News stories over the last twenty years have drawn our attention to the difficulties encountered by individuals as a result of the diversity of rules on surnames in the Member States of the European Union. A person whose choice of surname in one Member State is not recognised in another which assigns a different surname to them must when passing from one State to the other, dispel any doubts regarding their identity and sometimes allay suspicions of misrepresentation arising from the discrepancy between the surnames used. This seriously impairs the exercise of their right to free movement.

Legislative reforms in the Member States, surprisingly high volumes of case-law activity on this subject on the part of the Court of Justice of the European Union and the European Court of Human Rights, and lastly the activity in this area of other international organisations such as the International Commission on Civil Status lead us to wonder whether the time has not now come for the Union to legislate on names.

To attempt to answer this question, it is necessary to first prepare an overview of both the national and private international laws of the Member States and of the two supreme European jurisdictions. Then, we should examine international laws regarding names. Once this has been completed, we will look at a few options in terms of the area and methods that could be employed for any future legislative action by the Union.
1. OVERVIEW OF THE LAW IN THE MEMBER STATES

It is useful to distinguish according to whether it is a question of substantive law in the Member States or of their private international law.

1.1. Rules of substantive law

Due to the number of Member States, it has not been possible to conduct an exhaustive presentation, but the research that has been undertaken in respect of a certain number of States has revealed the points around which the greatest disparities exist\(^1\). Whereas numerous reforms introduced in the Member States over the last two decades, almost all characterised by a move towards freedom of choice in this area, have helped to lessen these disparities, some do still continue to exist today. A distinction is made between the transfer of surnames from parent to child and the effects of marriage or a registered partnership on the names of the spouses or partners.

1.1.1. Transfer of names from parent to child

Prior to recent developments in most of the Member States, their laws were divided between various models for the choice of surname. In the States which provide for the spouses to choose a married name (Germany, Finland and Sweden), this name is naturally the one that is assigned to the children of the couple. In the absence of a shared name and in States which do not have a shared name system, most legislatures follow the patriarchal model of assigning the father’s name to a child (Germany, Austria, France and Italy amongst others) or, for children born outside of wedlock, that of the mother or, usually with the same outcome, that of the parent whose relationship to the child was established first. Some, like Spain, accommodated both the paternal and the maternal lines with a child taking the first name of the father and the first name of the mother. Others, following the English model, leave parents the freedom to choose the name of their child.

Recently, the laws of the Member States have been divided on the following points: the possibility for parents to choose the names of their children, the extent of the choice, and the name of a child in the absence of a name being chosen.

Possibility of choice

The right of parents to choose the surname of their children is gradually becoming common in the law of the Member States and those who formerly opposed this possibility are gradually accepting it. Thus, as recently as several years ago, Austria, Belgium, France and Italy did not allow parents any choice. In these countries, the children had to bear their fathers’ surnames. This extremely rigid rule was contrary to sexual equality. There was also the risk of the gradual extinction of surnames in the absence of male heirs in a particular branch of a family.

The imperative nature of the law was discontinued in France by an Act of 4 March 2002, frequently amended since that time, which granted parents the right to choose the surname of their child by means of a declaration to the Registrar. In Italy, in a case where the parents of a child wished to confer her mother’s family name on her and were unsuccessful before the courts, a judgment of the Italian Constitutional Court of 6 February 2006 condemned this discrimination between the mother and father. In 2014, the European

\(^1\) To this end, we have used, inter alia, publications by the International Commission on Civil Status (ICCS), particularly its *International Practical Guide to Civil Status* and the annual general reports of the Secretary-General of this organisation, the national reports published annually (in German) in the *Zeitschrift für das gesamte Familienrecht, FamRZ* (German Family Law Journal), and ad hoc research.
Court of Human Rights pronounced the same verdict and, referring to Article 46 of the European Convention, it considered that ‘reforms of Italian legislation and/or practice should be adopted in order to make such legislation and such practice compatible with the conclusions it had reached in this case, and to ensure that the provisions of Articles 8 and 14 of the Convention were respected’. In Austria, it was necessary to wait for the *Kindschafts-und Namensrechts-Änderungsgesetz 2013* (Parent and Child and Legal Name Amendment Act) and in Belgium, an Act was passed on 8 May 2014, for parents to be allowed the right to choose. It had been permitted in Poland since the passing of the law of 24 July 1998.

*The extent of the choice*

Those States that envisage this right to choose generally allow the parents to give the child the surname of one and/or the other parent. In cases where the parents do not bear a married name, German law, which is stricter, only allows the parents to choose the surname of one parent or the other for their child, disallowing the option of a name composed of the surnames of both parents. As shall be seen, this rigour was the reason for the Grunkin and Paul Judgment of the Court of Justice.

Most of the other Member States have provided for both options and even allow parents, if they choose a double name, to determine the order in which these two names are to appear themselves. This is the case for example in Belgium (Act of 8 May 2014), France (Article 311-21 of the French Civil Code) and in Luxembourg (Act of 23 December 2005). A similar idea but with more limited scope exists in Spain, where the Act of 5 November 1999 (Article 109 of the Spanish Civil Code) gave parents the right to reverse the normal order of their traditional double-barrelled surnames and to declare, at the time they declared the birth, that the first part of the child’s surname would be the first part of the mother’s surname and the second part of the child’s surname would be the first part of the father’s surname. There is even greater liberalism still in Austria since the law of 2013. The family name chosen by the spouses is assigned to the children, but they can be given a double surname composed of the surnames borne by the parents before marriage. In the absence of a shared surname, it is possible to choose the surname of one or other of the parents or a double-barrelled surname composed both surnames separately for each child.

Going a step further, Ireland allows a different surname from that of the two parents, but such cases are subject to authorisation by the Civil Registration Authority.

*Surname of a child where a surname has not been chosen*

There remain numerous disparities between our laws. The conferring of the father’s surname exists in some of them. This is the case in Belgium (Article 335 of the Belgian Civil Code) and France (Article 311-21 of the French Civil Code) if the parent and child relationship is established in relation to the two parents at the same time. If it exists in relation to one of the parents, it is logically the surname of that parent which is conferred on the child. In Austria, since the law of 2013, it is conversely the mother’s surname which is conferred upon the child as a last resort (Article 155 paragraph 3 of the Austrian Civil Code).

This alternative solution in favour of the surname of one of the parents may be interpreted as expressing the agreement of the latter, even if implicit. However, if it is used in the event of a disagreement between the parents, as foreseen by the Belgian Civil Code, it ignores the principle of parental equality. Other solutions are sometimes also adopted. In France and in Luxembourg, if the disagreement of the parents is indicated to the registrar
prior to or at the time the birth is declared, the child takes the surname of both parents. The order of the two surnames is determined by the drawing of lots in Luxembourg, whereas in France, it is determined by alphabetical order since the Act of 17 May 2013. This solution was rejected in Spain. If the parents fail to agree, it is the registrar who decides the order in which the surnames are given in the greater interest of the child (Spanish Civil Registration Act 20/2011 of 21 July, which will enter into force on 15 July 2015).

In Germany, in the event of a disagreement between the parents, an original solution has been retained. A family law judge (Familiengericht) grants the spouse of their choice the right to determine the surname of the child. If the spouse does not exercise this choice within a given time frame, the child will bear the surname of that parent (paragraph 1617 subparagraph 2 of the German Civil Code).

1.1.2. The surnames of spouses and registered partners

This variety of solutions that exists amongst the laws of the Union in relation to children’s surnames also applies to spouses’ surnames. There has been a significant decline in the old patriarchal tradition of conferring the husband’s surname upon the woman in favour of either each spouse keeping their own surname, often with the right of using the spouse’s name, or the choice of a shared married name.

The practice of women being assigned the name of their husband has remained intact for a long time, in the absence of any alternatives, in certain Member States such as Austria, Greece and Italy.

Separate surnames in marriage is the most common rule, particularly in the following States: Austria since 2013, Belgium, Spain, France, Greece since 2008, Ireland, Luxembourg, United Kingdom and since an act passed on 24 July 1998, Poland.

Some laws provide for parents to choose a married surname which then replaces the surnames held by each spouse previously. Thus, in Germany, paragraph 1355 of the German Civil Code envisages that spouses must determine a shared family name (Ehename) by making a declaration before a registrar, and this name will be passed on to the couple’s children. The name is then kept by each of the spouses after the dissolution of the marriage due to the death of the other spouse or due to divorce, unless a declaration is made to the contrary in order to take back the surname that was used previously. The married name must be the birth surname of one of the spouses or the surname one of the spouses has at the time of the declaration. However, the law does authorise the spouse whose name has not been chosen to add, also by declaration before the registrar, their own surname to the married name. In the event that the spouses cannot decide on a married name, the law envisages that each one continues to use the name that they used previously after they are married. In Austria, the options are similar to those under German Law since the law of 2013, save that spouses may choose to combine their names and that each spouse can choose to give their name the masculine or feminine form in keeping with the language of origin of that name. In Hungary, women were given a vast array of options by the law of 1952, where they can also add a suffix to the chosen surname to indicate whether they are married or widowed. A married name chosen by the spouses is also envisaged in other Member States, such as Finland and Sweden.

This wide variety of options under the civil law of the Member States is the source of numerous conflicts of law which themselves result in an equally wide variety of solutions.

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1.2. Private international law of the Member States

Numerous Member States have recently consolidated or reconsolidated their private international law and possess written rules on conflicts over surnames. Some legislations have different rules regarding the recognition of surnames conferred in other States.

1.2.1. Conflicts of law rules

Main connection

The majority of Member States still refer choice of surname to the national law of the person concerned considering it to be the law governing their personal status. This solution is expressly declared in the private international laws of the following Member States (non-exhaustive list): Germany (Article 10 of the Introductory Act to the German Civil Code (the EGBGB)), Austria (paragraph 13 of the Act of 15 June 1978), Belgium (Article 37 of the Act of 16 July 2004), Bulgaria (Article 53 of the Private International Law Code of 17 May 2005), the Netherlands (Article 19 of the Act of 19 May 2011), Poland (Article 15 of the Act of 4 February 2011), Romania (Article 2576 of the Act of 24 July 2009), Slovenia (Article 14 of Act 56/1999) and the Czech Republic (Article 29 of the Act of 25 January 2012). It is implied and comes from a long tradition in Member States such as France, Greece and Italy. Solutions for conflicts of nationalities are varied, ranging from the preponderance of the nationality of the authority concerned to the alternative application of the national law of the person concerned.

In the Baltic States, or in Lithuania and Estonia at least, recent laws do not make any express provisions in relation to surnames, but consider personal status as being governed by the country of residence (Estonia) or the country of habitual residence (Lithuania, Article 1.16 of the Act of 17 August 2000), which would indeed seem to cover surnames. The same solution prevails in Denmark, as demonstrated by the Grunkin and Paul case.

Right of choice

Some laws, whilst leaning towards a connection between personal status and national law, accept that this connection is not imperative and allow those concerned to choose the law of another country.

Thus, in Germany, Article 10 of the Introductory Act of the German Civil Code allows spouses either during the wedding or after the celebration of marriage to choose the surname they will use after they are married in conformity with the national law of one of the spouses or in conformity with German law if Germany is the place of habitual residence for one of them. And, similarly, the legal representative of a child may declare that that child will use the surname determined by the national law of one of the parents, by German law if Germany is the habitual residence of one of the parents or, where applicable, by the national law of the person conferring their surname upon the child (cf. paragraph 1618 of the German Civil Code).

Though more restricted, Romanian and Czech laws also stipulate the flexibility of a national law connection. On the subject of the choice of surname for a child, the first prescribes 'the law of the State of which ordinary citizenship has been attained both by the parents and the child [and] the law of the State in which the child was born or has resided since birth' (Article 2576 paragraph 2). Czech law only has one provision relating to change of surname (paragraph 29). In principle, this is governed by national law, but the party may also refer to the law of the country of their habitual residence (paragraph 29, clause 3). For change of surname, Bulgarian law also allows a foreigner whose habitual residence is in Bulgaria to request for Bulgarian law to be applied (Article 53, paragraph 4).
1.2.2. Recognition of names

Judgments pronounced by the Court of Justice of the European Union in the cases Garcia Avello (2 October 2003, Case C-148/02) and Grunkin and Paul (Case C-353/06), according to which 'Article 18 EC precludes the authorities of a Member State, in applying national law, from refusing to recognise a child’s surname, as determined and registered in a second Member State in which the child – who, like his parents, has only the nationality of the first Member State – was born and has been resident since birth', led many Member States to reconsider their position on the recognition of surnames acquired in another Member State, or where applicable, in a third Member State, in accordance with a law other than that determined by their own rule on conflicts of law. Some only accept recognition in a limited way, whilst others establish recognition as a principle outright.

Limited acceptance of the recognition of surnames

In Belgium, the Member State directly concerned by the Garcia Avello Judgment, the Code of Private International Law published by the Act of 16 July 2004, contains quite a restrictive Article 39 on the recognition of changes of first names or surnames performed in foreign countries. The change is recognised if it is recognised in the Nation State of the person concerned. It is not permitted for Belgian nationals, unless the change is in conformity with the rules on conflicts of law of a State of which the person concerned is also a national. Dual nationality applied in the Garcia Avello case, save that in this case, the issue was not the recognition of a change of name that had occurred abroad but a change of surname requested directly in Belgium. For people with dual nationality, a change would be permitted, but the European Commission had to institute proceedings against Belgium in September 2012 before the Court of Justice due to the difficulty encountered by the parents to ensure the registration of their child directly in the Belgian civil registers under the name envisaged by the other national law of the child, without having to first change the surname.

In Spain, the General Department of Registers and Notaries published the Directive of 24 February 2010 on the recognition of family names recorded in the civil registers of other Member States of the European Union. It prescribes that the registration of birth in the Spanish Civil Register using family names determined and registered in a foreign civil register, in other words the recognition of such names, is not permitted as a general rule. The birth must have taken place in a Member State of the European Union, which has been the country of habitual residence of the parent(s) and the private international law of the State in which the child was born rules that family names are governed by the law of habitual residence.

In Germany, following the Grunkin and Paul Judgment, an Act of 23 January 2013 stipulated, with a new Article 48 of the Introductory Act to the German Civil Code, that when the law that applies to the surname of a person is German law, this person may, by means of a declaration before a German registrar, choose the surname acquired during habitual residence in another Member State of the European Union and entered in the civil register of that other Member State, provided that this did not expressly contravene the main principles of German Law. In summary, it can be said that the law of 2013 accomplished the minimum required to bring German law into conformity with the Grunkin and Paul Judgment.

General acceptance of the recognition of names

The Netherlands have a very liberal rule on this matter. According to Article 24 paragraph 1 of the Act of 9 May 2011:

‘If the first names or the surname of a person have been registered outside the Netherlands

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3 On the subject of this law, see C. Kohler and W. Pintens, ‘Entwicklungen in europäischen Personen- und Familienrecht 2012-2013’, FamRZ 20131440; C. Kohler, ‘La reconnaissance des situations juridiques dans l’Union européenne: le cas du nom patronymique’, in P. Lagarde (Publication Editor), La reconnaissance des situations en droit international privé, Paris, Pedone, 2013, p. 67 et seq.
at the child’s birth or they have been modified following a change in their personal status which has occurred outside the Netherlands and these first names or the surnames have been recorded in a document prepared by a competent authority in accordance with the local regulations in force, the first names or the surname thus registered or modified shall be recognised in the Netherlands. Recognition may not be refused on grounds of incompatibility with the public order for the sole reason that a law other than that applicable by virtue of this Title [of the Law] has been applied’.

This liberal solution is the logical consequence of Article 9 of the same Law, which provides for the recognition of statuses created in a foreign State even by way of derogation to applicable law by virtue of Dutch private international law, ‘insofar as refusal [of recognition] would constitute an unacceptable violation of the justified confidence of the parties or of legal certainty’.

In Romania, although the Act of 24 July 2009 does not contain any specific provisions on the recognition of names, it does contain a general provision on the recognition of acquired rights, which would indeed seem to accommodate this:

Article 2567: ‘Rights that are acquired in a foreign country shall be respected in Romania, with the exception of cases where this would be contrary to public order under Romanian private international law’.
2. CASE-LAW OF THE EUROPEAN COURTS

2.1. The European Court of Human Rights

The European Court of Human Rights has on a number of occasions had to decide on applications relating to first names or surnames on the grounds of an alleged violation of Articles 8 (Right to respect of private and family life) and 14 (Prohibition of discrimination) of the European Convention on Human Rights. These decisions mainly affect the substantive law on names in the contracting States and, to a much lesser extent, private international law.

The intervention of the Court of Strasbourg presupposed that it could extend its jurisdiction to matters regarding names. Although the European Convention does not contain a provision on the law on names, in contrast to the International Covenant on Civil and Political Rights (Article 24, paragraph 2) and the International Convention of 1989 on the Rights of the Child (Articles 7 and 8), the Court admitted that ‘a person’s name, as a means of personal identification and a link to a family, none the less concerns his or her private and family life’ because, according to the Court ‘private life [is] conceived of as including, to a certain degree, the right to establish and develop relationships with other human beings, in professional or business contexts as in others’ (Burghartz Judgement v Switzerland, No 24, Application No 16213/90, 22 February 1994, wording repeated in later judgments). However, at the same time, it pronounced inadmissible an application by married parents to ensure that their daughter would not be entered in the Register of Births under their family name, but rather under her mother’s surname, considering that it was not entitled to substitute national authorities to decide which policy might be the most suitable in relation to family names (27 September 2001, pronouncing inadmissible Application No 36797/97, G.M.B. and K.M. v Switzerland).

Once this point had been admitted, the Court sanctioned numerous instances of discrimination existing in the law of the States that were parties to the Convention, but revealed itself to be more reserved with regards to the refusal by these States to allow changes of first name or surname.

2.1.1. Sentencing on discrimination

Sentencing on discrimination usually concerns the surname of spouses, but occasionally the transfer of their name to their common child as well.

Discrimination between the sexes is mainly related to the right of spouses and not just that of women. The previously mentioned Judgment, Burkhartz v Switzerland of 22 February 1994 (Application No 16213/90), in a case where a German husband and his German-Swiss wife had chosen her name as their married name, ruled against the Swiss authorities for refusing to allow the husband the right to put his own family name before the family name, which is her husband’s surname, whereas a married man keeps his family name as it was before he married. The judgment underlines the imperative nature of the rule of equality adding ‘that it is for the Turkish State to implement in due course such measures as it considers appropriate to fulfil its obligations to secure to each married partner, including the applicant, the right to keep their own surname or to have an equal say in the choice of their family name in compliance with this judgment’ (point 73).
On 9 November 2010 (Losonci Rose and Rose v Switzerland, Application No 664/06), the Court applied the principle of equality once more, ruling that the provisions of Swiss law that resulted in a wife of foreign origin marrying a Swiss husband being able to choose for her surname to be governed by her national law pursuant to Article 37, paragraph 2 of the federal law on private international law, whereas this choice was not possible for a Swiss woman marrying a man of foreign origin if they opted to take the woman's name as their family name (Point 43).

The prohibition of discrimination includes the transfer of surnames to the children of a couple. In the Judgment Cusan and Fazzo v Italy (7 January 2014, Application No 77/07), it ruled against the Italian rule of law which intended that the choice of surname should, without exception, be that of the child’s father, despite a common desire of the spouses to the contrary, which in this case had led to a refusal by the authorities to allow the parents to confer only the mother’s surname upon their child.

2.1.2. Changing of forenames and/or surnames

In the case Daroczy v Hungary (1 July 2008, No 44378/05), the Court heard the appeal of a woman who had been widowed against Hungary which had forced her to change her surname which she had used for more than fifty years and which featured in the civil registers on the grounds that this name had been written incorrectly in contradiction with the law. It held that this interference into the private life of the applicant was disproportionate and constituted a violation of Article 8.

It is however more circumspect vis-à-vis appeals against refusals to allow changes of first names or surnames demanded by the persons concerned. It is primarily asserted that the change requested was intended to adjust the official first name or surname to that by which the applicant is known or to get rid of a name that is difficult to bear and which affects the person in their private life. The Court considers that whilst obliging a person to change their surname always constitutes an interference into the right of a person to the respect of their private life, a refusal to allow such a change cannot necessarily be deemed an interference. Therefore, it usually rejects appeals of this nature.

Consequently, in one Judgment, Stjerna v Finland (25 Nov. 1994, Application No 18131/91) there is a refusal to see such an interference in the refusal by the Finnish authorities to accept the applicant’s request to change his name from Stjerna to Tawaststjerna, based on the nickname that his current surname apparently resulted in and the fact that the surname requested was maintained to have been used by his ancestors in the XVIII century. Similarly, and on two occasions, the Court has refused to rule against refusals to allow or to change first names, on the grounds that the interested parties were not prevented from continuing to use the desired first name in everyday life (see ECHR, 24 Oct. 1996, Guillot v France, Application No 15773/89, first name Fleur de Marie refused, but Fleur, Marie accepted; 17 Feb 2011, Goemanova v Bulgaria, Application No 11369/04: refusal to change first name Donka, registered at birth, to Maya, by which the applicant was known in family and social circles). In contrast, in the Judgment Johansson v Finland, the Court held that considerations of public interest argued by Finland did not justify its refusal to register the first name Akl (6 Sept. 2007, No 10163/02).

More recently, the Judgment Henry Kismoun v France (5 Dec. 2013, Application No 32265/10) upheld an appeal against a refusal to allow a change of surname. The applicant, who held Franco-Algerian dual nationality and had been born in France, had been registered under his mother’s surname, Henry. She had abandoned him very early on and he was acknowledged and taken in by his father, who took him to Algeria where he was schooled and where he completed his military service under his father’s surname, Kismoun, under which he was registered in Algeria. When he discovered at the age of 21 that his civil status in France was Christian Henry and not Cherif Kismoun, as it was in Algeria, he asked the French authorities to change his name. The Court ruled against the refusal that he received. It recalled ‘that in the area in question, the contracting States enjoyed a significant margin of appreciation [and that] it was not the duty of the Court to replace
competent national authorities to decide the most appropriate policy for changes to surnames’ (Point 28), but considered that the national authorities had not ‘achieved the right balance in weighing up the different interests involved which are on the one hand, the private interest of the applicant to bear his Algerian name and on the other, the public interest of regulating the choice of surnames’ (Point 30). In fact, the applicant asked the national authorities to recognise the identity he had developed in Algeria, the name ‘Kismoun’ representing one of the main components of this identity. He wanted to have just one name, the one he had used since his childhood, in order to put an end to the disparities arising from the fact that the French civil register and the Algerian civil register recognised him under two different identities. The Court recalled on this point that being a main component of a person’s individuality in society, surnames form part of the core considerations affected by the right to respect of one’s private and family life (Losonci Rose and Rose v Switzerland, No 664/06, paragraph 51, 9 November 2010). It also underlined, as had the Court of Justice of the European Union in the above-cited case-law [Judgments Garcia Avello and Grunkin and Paul], ‘the importance for a person to have a unique name.’ (Point 36).

2.2. Court of Justice of the European Union

Whilst the European Court of Human Rights is mainly concerned, in the afore-mentioned judgments, on the protection of private and family life which includes the right of a person to establish and develop relationships with other human beings, the Court of Justice of the European Union, without denying the importance of surnames in private life, concentrates more on the area of free movement of European citizens. In the cases that it hears, it examines whether decisions taken by a Member State in relation to the surname of a European citizen constitute a legitimate obstacle to their right to free movement.

The Court has intervened in disputes concerning the written form of surnames resulting from the diversity of languages with the European Union on the one hand and in cases directly related to the choice of surname on the other.

2.2.1. The written form of surnames

The first judgment of the Court concerning the written form of a name was pronounced on 30 March 1993 in the Konstantidinis case (Case C-168/91). The applicant was a Greek man who worked on a freelance basis in Germany and whose name had been carried over into the German civil registers after transliteration following ISO standards. He challenged this transliteration which made his name unrecognisable and could only be a hindrance to him in his professional life. The Court upheld his appeal and found that it would be contrary to the principle of non-discrimination and to the right of establishment if a Greek was obliged to use in his professional life a transliteration of his name used in the civil registers which changes its pronunciation if this adjustment carried a risk of confusing potential clients.

Many years later, a similar question arose in the case of Runovic-Vardyn (12 May 2011, Case C-391/09). The applicant was a woman of Lithuanian nationality but Polish origin. Firstly, she alleged the Lithuanian civil registration authorities had registered her Polish first name and surname in their Lithuanian form and had rejected her request to change her records to respect the Polish spelling. Furthermore, as she was married to a Polish man and lived in Belgium, she also asked that the family name of her husband, which had been added to the maiden name of the applicant and recorded in her marriage certificate, be recorded in such a way so as to respect Polish spelling rules. The Court rejected the first question of the application. The fact that the family name of a European citizen, used before her marriage, as well as her first name cannot be changed and registered in certificates of civil status of the Member State from which she originates in anything other than the characters of the language of that Member State ‘is not liable to deter a citizen of the Union from exercising the rights of movement recognised in Article 21 TFEU and, to that extent, does not constitute a restriction.’ (Point 70). On the second question, the Court did not rule out that the different spelling of the same family name applied to two people from the same couple could lead to inconvenience for the parties concerned. If this
was the case, which had to be ascertained by the court of reference, it would represent a restriction to the freedoms established for all citizens of the European Union by Article 21 of the TFEU.

2.2.2. Choice of surname

The notion of European citizenship, together with its corollary freedom of movement, also serves as a foundation for this second category of decisions by the Court of Justice.

The Garcia Avello Judgment of 2 October 2003 (Case C-148/02) gave a ruling on the surname of two children with dual nationality, born in Belgium with a Belgian mother and a Spanish father. When the Belgian authorities, applying Belgian law, gave the children the father’s surname (Garcia Avello) the parents requested in vain that they amend the surname in accordance with Spanish law, which gives the child the first surname of the father followed by the first surname of the mother, i.e. Garcia Weber.

The Court’s judgment is important in several respects. Firstly, it included the issue of surnames as being within the competence of the European Union, at least partially. 'Although, as Community law stands at present, the rules governing a person’s surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law, (see, by analogy, the Judgment of 2 December 1997, Dafeki, C-336/94, Applications p. I-6761, Points 16 to 20) in particular with the Treaty provisions on the freedom of every citizen of the Union to move and reside in the territory of the Member States’ (Point 25). Secondly, the Court decided that by treating these Belgian-Spanish children as if they exclusively Belgian, the Belgian authorities ignored the difference of these statuses and consequently violated the principle of non-discrimination (Article 12 EC) on grounds of nationality in regard to the rules governing their surname. In fact, 'In contrast to persons having only Belgian nationality, Belgian nationals who also hold Spanish nationality have different surnames under the two legal systems concerned. More specifically, in a situation such as that in issue in the main proceedings, the children concerned are refused the right to bear the surname which results from application of the legislation of the Member State which determined the surname of their father' (Point 35). Finally, for the Court, as regards European citizenship and free movement: 'It is common ground that such a discrepancy in surnames is liable to cause serious inconvenience for those concerned at both professional and private levels resulting from, inter alia, difficulties in benefiting, in one Member State of which they are nationals, from the legal effects of diplomas or documents drawn up in the surname recognised in another Member State of which they are also nationals' (Point 36).

The Grunkin and Paul Judgment of 14 October 2008 (Case C-353/06) settles the conflict between the civil law and the private international law of two Member States regarding the attribution of surnames to children. In this case, which was more simple than the previous one because there was no conflict of nationalities, a child of German parents whose habitual residence was in Denmark was born in Denmark. As permitted by Danish law applicable as the law of habitual residence according to the rule of conflict of Danish law, the child was given a double-barrelled surname composed of the surnames of the two parents. Later on, when the two parents wanted to register this double-barrelled name in the German civil registers, they were confronted with the refusal of the German authorities based on the fact that German law, applicable as the national law of the child according to the German rule of conflict, only allowed parents to choose the name of one or other of the parents for the child, but did not allow the choice of a double-barrelled name made up of the surnames of the two parents.

The Court did not rule against the German rule of conflict which links the surname to the national law nor the German substantive law which refuses the principle of the choice of a double-barrelled surname for a child, but the refusal by the German justice system to recognise in Germany the surname which had been attributed to the child in accordance with the law in Denmark. On this point too, the Court based its decision on the freedom of
movement linked to European citizenship. It underlined that ‘If those authorities refuse to recognise the surname as determined and registered in Denmark, the child will be issued with a passport by those authorities in a name that is different from the name he was given in Denmark. Consequently, every time the child concerned has to prove his identity in Denmark, the Member State in which he was born and has been resident since birth, he risks having to dispel doubts concerning his identity and suspicions of misrepresentation caused by the difference between the surname he has always used on a day-to-day basis, which appears in the registers of the Danish authorities and on all official documents issued in his regard in Denmark, such as, inter alia, his birth certificate, and the name in his German passport’ (Points 25 et 26).

Consequently, the Court ruled against the refusal by a Member State, on applying national law, to refuse to recognise a child’s surname, as determined and registered in a second Member State in which the child – who, like his parents, had only the nationality of the first Member State – was born and had been resident since birth. The Court therefore obliges Member States to recognise the surname of a child who is a national of that country, which has been conferred in another Member State of habitual residence, even if it has not been conferred in accordance with applicable law under conflict rules of the State where the status is requested.

The Court only authorised a refusal by a Member State to recognise a surname attributed to one of its nationals in another Member State because the surname included a title of nobility not allowed in the first Member State under its constitutional law (CJEU 22 Dec. 2010, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, Case C-208/09).
3. OVERVIEW OF INTERNATIONAL LAW

Large international organisations, such as the United Nations Organisation and the Council of Europe, are mostly involved in issues of substantive law regarding surnames. They aim to ensure that everyone has a surname and to condemn any discrimination between men and women. It seems that only the International Commission on Civil Status (ICCS) has really faced the problems posed to private international law by surnames head on.

3.1. United Nations

Several important laws should be noted.

International Covenant on Civil and Political Rights (19 December 1966)

According to Article 23, paragraph 4: «States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution [...]». Although this provision does not mention surnames, it has been interpreted by the United Nations Human Rights Committee as obliging States Parties to ensure the absence of discrimination between men and women, particularly in relation to the right of each spouse to continue to use their original family name or to participate on an equal footing in choosing a new family name.

Convention on the Elimination of all Forms of Discrimination Against Women (7 March 1966)

In paragraph 1(g) of Article 16, this Convention provides as follows: ‘States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: [...] The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation’.


Parts of Articles 7 and 8 regard the surname of the child:

‘Article 7, 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.
Article 8
1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.’

Even if this Convention is applied directly in some Member States and can be relied on by individuals, it does not establish any rule regarding the methods of determining a surname and relies on the national legislation of each State.
3.2. The Council of Europe

In the absence of any binding laws, it is important to cite Resolution (78) 37 of the Committee of Ministers of 27 September 1978 on Equality of Spouses in Civil Law.

The objective of this text is to invite Member States to eradicate forms of gender-based discrimination that still existed in their legislation and in practice in relation to the choice of a family name and in the conferring of the surnames of parents to their children. Paragraph 6 of the resolution proposes several solutions in this sense:

'6. (...) to regulate matters concerning the family name of the spouses to ensure that a spouse is not required by law to change his family name in order to adopt the family name of the other spouse and, in doing so, to be guided for instance by one of the following systems:

i. choice of a common family name in agreement with the other spouse, in particular the family name of one of the spouses, the family name formed by the addition of the family names of both spouses or a name other than the family name of either spouse;

ii. retention by each spouse of the family name possessed prior to the marriage;

iii. formation of a common family name by the operation of law by the addition of the family names of both spouses; ‘

The International Commission on Civil Status

This still little-known small international organisation was established in 1950 and has its headquarters in Strasbourg. Its objective is to facilitate international cooperation in civil status matters and to encourage the exchange of information between registration officers of the Member States. Aware of the difficulties encountered by citizens due to the diversity of national legislation, it has established five conventions on this subject. Two of these are of a technical nature and do not really affect substantive law. The three others do, but they have been ratified improperly or not at all. It is essential that they are nevertheless taken into consideration when discussing possible future European legislation on this subject as they reflect current thinking and ideas.

Conventions of a technical nature

Convention No 14 on the recording of surnames and forenames in civil status registers, signed at Berne on 13 September 1973 (7 ratifications). Its objective, though modest, is that of ‘ensuring uniformity in the recording of surnames and forenames in civil status registers’ which concerns diacritic marks that vary from language to language and transliterations from one alphabet to another, which gave rise to difficulties between Germany and Greece4.

- Convention No 21 on the issue of a certificate of differing surnames, signed at The Hague on 8 September 1982 (4 ratifications). This certificate is ‘intended to facilitate proof of identity for persons who, owing to differences between the laws of certain States, particularly regarding marriage, filiation or adoption, are not designated by one and the same surname’ (Article 1, paragraph 1). The Convention thus provides a remedy for the hindrance caused by this diversity, but it does not lessen that hindrance in any way.

Conventions affecting substantive law

Convention No 4 on changes of surnames and forenames, signed at Istanbul on 4 September 1958 (9 ratifications) obliges the Contracting States 'not to authorise changes

of surnames or forenames for nationals of another Contracting State, unless they are also nationals of the first-mentioned State’ (Article 2). The underlying idea, as seen from the legal expert’s perspective, is that a change of name granted by the public authority is an Act of Sovereignty which may only be exercised over nationals or refugees and stateless people resident on the territory.

Convention No 19 on the law applicable to surnames and forenames, signed at Munich on 5 September 1980 (4 ratifications). Markedly more ambitious than the last, its objective is to establish common rules of private international law in this area and envisages that the ‘surnames and forenames of a person shall be determined by the law of the State of which he or she is a national’ (Article 1), even if it is the law of a State which is not a Contracting State (Article 2).

Convention No 31 on the recognition of surnames, signed at Antalya on 16 September 2005 (not entered into force). Compared to earlier texts, this one deliberately adopts a different approach. Instead of rules of conflicts of law, it lays down rules for recognition. It therefore leaves Contracting States free to establish as they will the rules on the attribution of surnames, substantive rules and conflict rules, but it obliges them to recognise the name attributed to a person in another Contracting State, if that person had a connection which they establish. In this way, it shows the way forward.
4. PERSPECTIVES FOR EUROPEAN LEGISLATION

4.1. General considerations

Rejection of European legislation on the substantive law on surnames

Any future European legislation on surnames must remain within the confines of the principle of subsidiarity which requires that in areas which do not fall within its exclusive jurisdiction, the Union only intervenes if and to the extent that the objectives of the action envisaged cannot be achieved properly by the Member States (Article 5, paragraph 3 of the TEU). The Court of Justice constantly repeats in the judgments cited above that the rules governing the surname of a person fall within the jurisdiction of the Member States, even if they must nevertheless respect Community law in the exercise of this jurisdiction.

This principle should considerably limit any legislative intervention by the Union in substantive law on surnames. The rules for the attribution of surnames are rooted in the history, the culture and the beliefs of the Member States and their diversity is merely a reflection of the national and cultural identities of the Member States. Moreover, positive law, both international and European, already imposes the principle of non-discrimination and the respect of private life on the Member States in relation to surnames and other subjects (see above, in Chapter 2, Case-law of the European Court of Human Rights and, in Chapter 3, the international and European laws cited). It hardly seems possible nor desirable to go further.

Usefulness of European legislation on the substantive law on surnames

It is different for private international law on surnames. Specific difficulties are created by the diversity of legislation, both substantive and private international law. As already shown in another study, the main consequence of this is that one and the same person will not have the same name in different States with which they have a connection due to nationality, habitual residence, or their place of birth or marriage, which is capable, as emphasised for good reason by the previously cited judgments of the Court of Justice, of hindering their freedom of movement. A few examples, chosen from amongst those which have been discussed during the research of the ICCS, should suffice.

A Franco-German couple, a French woman and a German husband, have their habitual residence in Germany. The spouses make a declaration before the German registrar, in accordance with paragraph 1355 of the German Civil Code, in which they choose the husband’s surname as their married name. As far as German law is concerned, the woman has lost her maiden name and has now assumed the matrimonial name. As far as French law is concerned, which does not authorise such a declaration, the woman keeps her maiden name.

The child of a Spanish father and a German mother is born in Germany. At the time of birth, the parents make a declaration before the German registrar, in accordance with paragraph 1617 of the German Civil Code, in which they choose the mother’s surname as the surname of the child. This name will not be recognised in Spain, because according to Spanish law, a child’s surname is composed of the father’s first surname and the mother’s first surname. The name appearing on the German birth certificate will therefore not be the same as the name appearing on official documents issued by the Spanish authorities.

From the moment that a unification of substantive law on surnames is excluded, European legislation could take either of the following pathways: a unification of conflict rules with the effect, at least in theory, that the surname would be attributed throughout the Member States based on one and the same law, or designing rules for the recognition in the Member States of surnames attributed in a different Member State. A recent study

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conducted by a working group of the German Federal Association of Registrars [hereinafter the German proposal] proposes following these two pathways at the same time.6

Limitations of this European legislation in relation to the recognition of surnames

The suggestion here is to develop rules for the recognition of surnames and postpone the unification of conflict rules until later on. The unification of rules on the conflict of laws is a necessity in other areas. For example, in the area of successions, it is necessary that the same rules apply to the assets bequeathed, distributed throughout the territory of several Member States. This is not the case in the area of surnames. The advantage to be gained from a unified law applicable to surnames in all the States of the Union must not be exaggerated. In the example given above of the Franco-German couple, the fact that the woman keeps her surname under French law and that she changes it under German law in exchange for her married name is not in itself an obstacle to free movement. However, this freedom is hampered if the surname attributed to a woman in the State where she has got married, for example, is not recognised in another Member State, in other words, if the woman is obliged to use a different surname when passing from one State to another.

This paper proposes the main articles that could become a rule on the recognition of names. Unlike the German proposal, there is no proposal in relation to the rules of conflict on the subject as these rules are not necessary for the purpose in question.

4.2. Rules regarding recognition

General considerations

There are two legislative models regarding the recognition of surnames: ICCS Convention No 31 of 16 September 2005 and Chapter 3 of the previously cited German proposal.

The ICCS Convention is extremely detailed. It examines in turn declarations on surnames upon marriage or dissolution of marriage, the taking back of a surname by operation of the law in the event of divorce or annulment of marriage, and surnames attributed to children in the State of birth and changes to surnames. In these different situations, the Convention also provides solutions for cases of dual or multiple nationality. It is relatively limited insofar as it makes the recognition of surnames subject to conditions of proximity between the State of origin of the surname and the party concerned, combining nationality and habitual residence, which is undeniably complicated. The German proposal is on the other hand extremely brief and undoubtedly inadequate for the purpose of resolving all the difficulties. The suggestion would be to take what is best of both of them. This is the objective of the articles proposed for a regulation on the recognition of surnames which is to be found as an annex to this study.

It is useful to explain the scope of the recognition of surnames, conditions for the recognition of surnames and the related effects of such recognition.

Scope of recognition

The principle should be that any surname entered in the registers of a Member State must be recognised in other Member States. This is what is envisaged in Article 1 of the proposed regulation. Recognition should cover changes of surname, whether they result from a declaration by the person concerned, as is the case in the domain of marriage (Article 1), from a change in civil status (Article 2) or from a decision by the public authorities (Article 4). The varied nature of these situations many however call for different conditions.

Names attributed or changed in a third State is not directly envisaged by the ICCS

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Convention nor by the German proposal. The principle of mutual recognition, which would underlie a regulation on the recognition of surnames, is restricted to the territory of the European Union. Consequently, it is advisable to let each Member State resolve the recognition on its territory of surnames attributed in a third State in accordance with its national laws. However, if a Member State of the European Union recognises this name and registers it in its civil registers, each person, particularly every European citizen, has the same interest for their surname to be recognised, principally for the exercise of their right to free movement, whether their surname was attributed in a Member State of the European Union or a third State. From the moment that a surname established in a third State has been entered in the registers of a Member State, it must be recognised in the other Member States (Article 5).

**Conditions for recognition**

The main difference between ICCS Convention No 31 and the German proposal is that the first makes the recognition of surnames dependent on the existence of a connection (nationality or habitual residence) between the interested party or parties and the State where the surname was attributed or modified, whereas the German proposal does not establish any such conditions, except in the specific hypothesis of a change of surname by decision of the public authorities. To be recognised in a Member State, the only condition is that the surname has been entered in the registers of another Member State. The more liberal solution offered by the German proposal is preferable to that of the ICCS Convention. The latter was developed at a time when the method for recognising status was not familiar and conditions had to be made for it to be accepted.

Today, it is clear that the recognition of surnames is necessary for the European Union to facilitate the free movement of European citizens. This would be hindered if the condition was not satisfied, as the interested party could not bear the same surname in all the Member States. Free movement would again be hampered, even if the condition was satisfied, if the authority of the State in which the surname is requested was to delay its decision to check it. This authority must recognise the surname without having to check anything but the existence of the surname, namely the fact that it is entered in the registers of the State of origin, as inferred from their identity documents. It should not have to check whether the law applied in the first State was applicable, nor even whether it was applied correctly7. The party concerned has a legitimate interest in seeing the surname that they bear recognised in all European Union Member States.

The only restriction to the obligation of recognising a surname can be the manifest contraction of doing so with the public order of the State in which it is requested (Article 6). This could be the case, at the request of the party concerned, if the surname to be recognised had been attributed in application of discriminatory legislation, for example one that obliged a woman to take her husband’s surname.

Changes in surnames resulting from a decision by the public authority represent a more delicate matter. Member States generally consider that the process of changing the surnames entered in their registers falls under their sovereignty and do not accept that the decision of another Member State constrains them in this respect. That is why the Convention of Istanbul (ICCS Convention No 4 cited above) of 4 September 1958 provides that the Contracting States undertake not to allow such changes for nationals from another Contracting State, unless they are also nationals of their country (Article 2) and it restricts the obligation of recognition to these changes alone (Article 3). The German proposal goes one step further and also envisages the recognition of changes of surname granted by the authorities of the State of habitual residence of the person concerned (Article 13, paragraph 2). The proposal refers to the practice of several Scandinavian States in this regard, consistent with the *Grunkin and Paul Judgment*, of allowing a change of surname for foreign nationals who are habitually resident in their countries8. It is recommended that the German proposal should be followed in this respect (Article 4).

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7 In this respect, see the explanatory statement of the German proposal, StAZ, 2, 2014, p. 41, No 56 and 60.
8 *Loc. cit.*, No 66.
Effects of recognition

The principle of the recognition of surnames signifies that the authorities of all the Member States other than the one in which the name was established must accept this name in their relations with the person concerned, particularly when providing official documents which they have occasion to issue to them. The ICCS Convention No 31 usefully specifies that a recognised surname is entered in the relevant official registers, without any special procedure being required (Article 8). It is proposed that this provision should be used (Article 7). Relevant official registers may be, if required and depending on the circumstances, civil status registers, population registers, land registers, etc.

The recognition of surnames must be disassociated from the recognition of family relations which determine the attribution of surnames, such as parent and child relationships, marriage, divorce, etc. The fact that the parent and child connection or the marriage connection (particularly between people of the same gender) is not recognised by the second State is not a reason for the surname attributed in the first State as a result of this connection not to be recognised. A similar separation is established in Article 22 of Regulation No 4/2009 of 18 December 2008 on maintenance obligations, which must be transposed into a regulation on the recognition of surnames (Article 3 of the proposal).

Finally, the proposal should also apply, by analogy, to the attribution of and changes to forenames (Article 8), which the European Court of Human Rights often has to rule on.
CONCLUSION

The legislation of the Member States of the European Union regarding surnames is extremely diverse.

As far as substantive law is concerned, some national legislation put the interests of private individuals first by allowing them the possibility, to a greater or lesser extent, of choosing and changing their surnames. Others are aimed at promoting family values and unity, the choice of family names being dependent upon developments in family law. Finally, the Member States assert more or less forcefully that it is in their interest that each individual has a surname, determined in accordance with precise and unchanging rules save well-defined exceptions.

In the domain of private international law, the majority of Member States link surnames to the national law of individuals, but this becomes difficult when they possess several nationalities or when family members are of different nationalities. Some States apply the law of the State of habitual residence of the person, whilst others, which may be the same, allow interested parties to choose which law will govern their name within certain limits.

This difference of approaches leads to deadlock, as illustrated in particular in the *Grunkin and Paul* case, where the same person can, according to the law of the Member State of habitual residence, applicable by virtue of its private international law, use a different surname to that which is attributed to them by the law of their national State, which is in turn applicable pursuant to the conflict rules of said State.

To remedy this deadlock, there are three theoretically viable options: the unification of substantive rules, the unification of the rules of conflict of laws or the adoption of rules on the mutual recognition of surnames attributed in a Member State. The first is not appropriate and would probably go beyond the jurisdiction of the European Union. The second is not necessary, nor sufficient, to obtain the objective desired, consisting in a person being able to bear the same name in all the States of the European Union, so as not to be hampered in exercising their right to free movement. The third solution - the adoption of rules on the recognition of surnames - is the most effective and simpler to develop. It would complement well the Commission’s proposal of 24 April 2013 recommending a regulation to promote the free movement of citizens and companies by simplifying the acceptance of certain public documents within the European Union, which specifically does not include the recognition of the content of public documents issued by the authorities of other Member States (Article 2, paragraph 2).
ANNEX: ARTICLES PROPOSED FOR FUTURE LEGISLATION ON THE RECOGNITION OF NAMES

Article 1.
A surname attributed at birth or acquired by declaration, entered in the registers of civil status of a Member State, shall be recognised in other Member States.

Article 2.
A change of surname resulting from a change of civil status of a person, entered in the registers of civil status of a Member State, shall be recognised in other Member States.

Article 3.
The recognition of a surname by virtue of this regulation shall not by any means imply the recognition of the family relationships at the origin of this surname.

Article 4.
A change of surname resulting from a decision by the public authority of a Member State shall be recognised in other Member States if issued by the interested party’s national Member State or Member State of habitual residence.

Article 5.
For surnames attributed to or obtained by a person in a third State, if they were recognised in a Member State in application of its national law and entered in the registers of civil status of that State, they shall be recognised in other Member States.

Article 6.
Recognition may only be refused if it is manifestly contrary to the law and order of the Member State in which it is requested.

Article 7.
Surnames recognised in application of this regulation shall be allowed by the authorities of the Member State in which it is requested and entered, where required, in the relevant official registers of that State, without any special procedure being required.

Article 8.
Articles 1 to 7 shall apply by analogy to forenames.

Biography
Paul Lagarde's stimulating contribution to the harmonisation of private international law, both at world and European level, is difficult to grasp. Professor since 1961, he taught in various French universities before joining Paris I (Sorbonne) from 1971 to 2001. He gave lectures at the Hague Academy of International Law. A delegate of France to many Sessions of the Hague Conference on Private International Law, he played a particular role as rapporteur for two relatively recent Hague Conventions (1996 on the Protection of Children and 2000 on the International Protection of Adults). As Secretary General, he steered the works of the International Commission on Civil Status from 2000 to 2008. A convinced European, he takes a very active part in the development of an EU private international law, e.g. very recently for the adoption and upcoming implementation of the 2012 Succession Regulation. A member of the Institute of International Law, he received the Hague Prize for International Law in 2011.
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Private international law as a regulatory tool for global governance?

Harm Schepel

Upon request by the JURI Committee, this paper provides an analysis of private international law in transnational litigation beyond the usual image of the discipline as a neutral tool facilitating the 'natural' operation of the market. Legitimate and functional global governance arises from the interaction of normative orders, be they public or private. Efforts to shield private global governance regimes from political and legal interference are, ultimately, as counterproductive as are efforts to 'protect' domestic and international legal systems from these regimes - both for business and consumers (and citizens). To regulate and manage this interaction, the concepts, methods, and tools of private international law are indispensable, if adapted to modern realities of private global governance.
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LIST OF ABBREVIATIONS

**CJEU** Court of Justice of the European Union

**ECHR** European Convention of Human Rights

**ECtHR** European Court of Human Rights

**FET** Fair and Equitable Treatment

**ISO** International Organization for Standardization

**NAFTA** North American Free Trade Agreement

**SPS** Sanitary and Phytosanitary Measures

**TBT** Technical Barriers to Trade

**WTO** World Trade Organization
EXECUTIVE SUMMARY

Private global governance and legal fragmentation have led to a world in a condition of legal pluralism. Different normative orders with competing claims and logics all strive for autonomy. Some of these regimes base their claims on their responsiveness to the needs of the global economy to isolate market-conform structures from the distortions caused by political contestation. This is true for both the regimes discussed in this paper. Global private standards-setters facilitate international trade by harmonizing technical standards for the quality and safety of goods and services and are seeking to impose their norms on States. Investment arbitration treaties provide insurance for foreign direct investment by allowing foreign investors direct access to international tribunals who decide on the legitimacy of State action under standards of public international law. But facile distinctions between ‘the market’ and politics, between nationals and foreigners, and between (market-facilitating) private law and (market-correcting) public law have been fatally undermined by the forces of globalization.

Private governance regimes strive for acceptance and recognition: if we are to ‘make demands on the world’, private international law has a vital role to play in ordering the interaction of the various claims exerted by diverse normative orders, and in setting out requirements for acts of recognition. As a discipline and a field of practice, private international law is used to the balancing acts involved with the need to take into account the effects of legislation on those beyond the realms of the political community by whom and in whose name the legislation was enacted; it is also attuned to the needs and demands of ‘others’ seeking protection by their own law in the face of adverse impacts of being subjected to foreign legal systems.

If we are to avoid either autonomy or subjection, to balance the demands of comity on the one hand and public policy on the other, and if we are to manage political conflict through the mediation of the law, we need productive mutual interaction of legal orders, not mutual indifference and political domination in the name of its absence. In that sense, private international law is a vital regulatory tool for global governance.
INTRODUCTION

Frer markets, more rules. The title of Steven Vogel’s classic evokes a central paradox of the denationalized economy: globalization comes not with the unleashing of market forces through massive deregulation, but with the expansion and differentiation of rules and agents performing regulatory and adjudicatory functions. This has resulted in a state of legal fragmentation in which traditional and familiar distinctions between private and public law, and domestic and international law become unsettled. The bewildering array of interacting normative orders in transnational fields has led to the resurrection of the concept of legal pluralism, both among socio-legal scholars and legal theorists confronting the transnational, among international lawyers confronting a lack of unity and hierarchy, and among private international lawyers coming out of their ‘closets’.

The term ‘private international law’ in global governance is ambiguous, as it is used to refer, sometimes indiscriminately, to two distinct phenomena. On the one hand, the term is sometimes used to refer to the rise of non-state actors in global economic governance; globalization and the privatization of governance functions seem to go hand in hand. On the other hand, it may see to the legal practice and discipline of private international law as a means of dealing with conflicts between different normative orders.

This latter use of the term may seem odd at first sight. ‘Private international law’ is not necessarily ‘private’ or ‘international’: it refers, rather, to the body of law that provides rules and standards to determine applicable law and competent courts to regulate relations between persons across different jurisdictions. As such, it is sometimes seen as a bastion of legal nationalism, where jurisdictions refuse to open up to foreign law in the name of ‘public policy,’ slowly eroded by the need for comity to accommodate the needs of the global economy. It is often also perceived as hopelessly stuck between the ‘public’ and the ‘private’, where the principled coherence of national legal systems is struggling to come to terms with party autonomy in transnational commercial contracts as regards choice-of-law and choice-of-forum clauses. Most of all, the doctrinal edifice of the discipline has been

attacked for is inability to deal with ‘non-law’, that is, with precisely the rising importance of private international legal orders.8

And yet, the return to fashion of private international law in conditions of legal fragmentation and pluralism seems perfectly natural. If the problem of global economic governance lies partly in conflicts of legal orders, then it is only logical to turn to the discipline that was crafted to deal with just that- conflicts of laws.

This brief paper will use the term in both ways: it discusses two distinct classes of private institutions that play a fundamental role in modern economic governance: private standard-setters and investment arbitration tribunals. Both of these exert enormous influence on the global economy and constrain the scope of State regulatory measures considerably. Importantly, both of these exercise their functions under authority ‘delegated’ to them by States in public international law treaties.9 The WTO Agreement on Technical Barriers to Trade binds Members to ‘international standards’ in the preparation and adoption of technical regulations. Bilateral Investment Treaties allow foreign investors recourse to arbitration tribunals to settle their disputes with host States under public international law standards of protection. Both these arrangements ‘privatize’ international law and have profound effects on the scope of regulatory powers of the State. And both throw up intricate questions of ‘conflicts of law’, as they inevitably run up against questions of the interaction of different legal orders and regimes.

My argument is fairly straightforward: legitimate and functional global governance arises from the interaction of normative orders. Efforts to shield private global governance regimes from political and legal interference are, ultimately, as counterproductive as are efforts to ‘protect’ domestic and international legal systems from these regimes- both for business and consumers (and citizens).

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1. INTERNATIONAL STANDARDS AND THE WTO

A large part of the accounting, quality, safety, social and environmental standards that regulate the global economy is set and monitored by private or hybrid associations and networks. These ‘new global rulers’ go about the business of rulemaking according to highly formalized procedures laid down in hefty, detailed and regularly updated tomes of codes, manuals and ‘standards for standards’. Even if important differences exist between these, there is a surprisingly robust common core of requirements and principles: elaboration of a draft by consensus in a technical committee with a composition representing a balance of interests, a round of public notice-and-comment of that draft with the obligation on the committee to take received comments into account, a ratification vote with a requirement of consensus, not just a majority, among the constituent members of the standards body, and an obligation to review standards periodically. A growing body of work investigates and reflects on these decision-making procedures under various metrics and concepts of accountability and legitimacy. Although assessments about compliance and effect are far from uniformly positive, there is little doubt about the mechanisms underlying the diffusion of these core principles; standard-setters strive for their standards to be widely used, and public recognition is a necessary condition for widespread use. Adherence to fundamental principles of administrative process, in turn, is a necessary condition for public recognition. However ‘legitimate’ the private regulatory process, however, private standards are usually denied the status of law. Their relevance and legal effect come filtered through what have been termed ‘mechanisms of degradation’.


14 A striking example is the recent effort of ISO to distinguish its work from that of the ISEAL Alliance on the basis of its adherence to WTO disciplines. ‘Any organization can claim to have developed a “standard”...but not all standards are created equal.’ ISO, International standards and ‘private standards’, Geneva 2010. Compare Columbia Specialty Co v Breman (1949) 90 Cal App 2d 372, 378: ‘Manifestly, any association may adopt a “code” but the only code that constitutes the law is a code adopted by the people through the medium of their legislatures.’

15 Graf-Peter Callies and Peer Zumbansen, Rough Consensus and Running Code- A Theory of Transnational Private Law (Oxford: Hart 2010), 101, on the basis of the mechanisms identified and described by Ralf Michaels, ‘The Re-State-ment of Non-State Law’, (2005) 51 Wayne Law Review 1209, 1228 et seq. As these authors are aware,
standards are either incorporated into the legal system as law by re-enacting the rulemaking process as legislative process,16 or they are reduced to mere facts. Tertium non datur.17 The problem with this bright-line jurisprudence is that, to turn a phrase, it ceases to make demands on the world.18 One can hardly place normative requirements on the production of facts, even ‘legal facts’.19 And applying a coat of constitutionally approved veneer to private rulemaking may conceal cracks in the wall, but does nothing to improve construction.20

Both the WTO Agreements on Sanitary and Phytosanitary Measures (SPS) and on Technical Barriers to Trade (TBT) rely on ‘international standards’ in order to achieve harmonization and market integration.21 They take, however radically different approaches to the definition of these standards. The SPS Agreement grants a monopoly, in their respective areas of competence, to designated international bodies, most notably the Codex Alimentarius for food safety, and gives the SPS Committee the power to ‘identify’ other organizations for matters not covered by these bodies. 22 This arrangement, one could argue, is simply a matter of parties to the Treaty consent to delegate powers to public international organizations they themselves are (usually) members of. The TBT Agreement, on the other hand, fails to define what an ‘international standard’ is, other than stipulating that an international standard is one produced by an organization whose membership is open to the relevant bodies of at least all Members. The explanatory note in its Annex 1.2 further notes that, while ‘standards prepared by the international standardization community are based on consensus, this Agreement covers also documents that are not based on consensus.’23 The TBT Agreement conspicuously fails to designate or even mention the most obvious source of international product standards, the International...
Policy Department C: Citizens’ Rights and Constitutional Affairs

Organization for Standardization (ISO). It seems clear, though, that the TBT Agreement contemplates the use of private international standards. In 2000, the TBT Committee enunciated a set of principles for the development of international standards including transparency, openness, impartiality and consensus.

EC- Sardines dealt with a Codex standard for purposes of Article 2.4 TBT, requiring Members to use relevant international standards ‘as a basis’ for their technical regulations. This particular standard, argued the EC, was not adopted by consensus and should thus not be considered a ‘relevant international standard.’ The Panel dismissed the TBT Committee’s Decision as a mere ‘policy statement of preference’, read the explanatory note in Annex 1.2 as acknowledging that consensus ‘may not always be achieved,’ and concluded that ‘international standards that were not adopted by consensus are within the scope of the TBT Agreement.’ The Appellate Body readily upheld the conclusion. Part of the Panel and the AB’s thinking, one would assume, was underpinned by the overlap between the SPS and TBT regimes. To demand ‘consensus’ from Codex under the TBT Agreement, where this is obviously not required for Codex standards to qualify as ‘international standards’ under the SPS Agreement, would have been awkward. To avoid differentiating procedural requirements of the very same organization under two different Treaties, the AB could have differentiated procedural requirements from different organizations under the same Treaty: Annex 2.1 could, after all, fairly plausibly be read to suggest that standards produced by the private standardization community are- and should be- adopted by consensus, whilst public organizations do- and may- adopt standards in ways falling short of consensus.

This, however, the Panel and the AB refused to do, with the result that the TBT Agreement seemed to require rather less of private international standardization than what the ISO demands of itself. The AB at least seems to have been aware of the problem. It emphasized that its conclusion is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the TBT Agreement does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe that an international standardization body should not require consensus for the adoption of standards. That is not for us to decide.

Sardines stands as a prime example of jurisprudential in global governance: it reduces ‘international standards’ to mere facts, and in the process both condemns States to conform their regulations to a normative benchmark which itself is unencumbered by any normative requirement whatsoever, and denies the potential of international law itself to demand minimum guarantees of legitimate rulemaking to bodies the WTO has delegated powers to.

The recent litigation between the US and Mexico in Tuna II offered an opportunity to revisit the matter. There, at issue was the status under the TBT Agreement of resolutions adopted

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24 It certainly seeks to draw private national bodies into the harmonization drive. The Agreement annexes a Code of Good Practice for the Preparation, Adoption and Application of Standards, and requires Members in Article 4 to ‘take such reasonable measures as may be available to them’ to ensure that non-governmental bodies accept the Code.

25 The Decision appears as Annex 4 to G/TBT/7, the Second Triennial Review on the Operation and Implementation of the Agreement on Technical Barriers to Trade, 13 November 2000.


under the Agreement on the International Dolphin Conservation Program, another public network. The Panel ‘acknowledged’ the AB’s statement in *Sardines*, but observed ‘nonetheless’ that the resolutions at issue were adopted by consensus. It then went on, in the very next paragraph, to classify them as ‘standards’ for the purposes of the TBT Agreement.30 The Panel, deliberately one has to assume, left the import of its finding of ‘consensus’ for its conclusion perfectly ambiguous by noting it came to it ‘from an analysis of the content’ of the material at issue.31 The Appellate Body took a more radical step: it explicitly overturned *Sardines* by elevating the TBT Committee’s Decision to the status of ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’ within the meaning of Article 31 (3)(a) of the Vienna Convention on the Law of Treaties.32 Thus equipped, it could deduce from the TBT Agreement itself ‘the imperative that international standardizing bodies ensure representative participation and transparency in the development of international standards.’33

However stunted, this brings us closer to establishing a ‘rule of recognition’ through which private governance regimes have to earn legal recognition by fulfilling requirements that are inherent in the very concept of law. For Kingsbury, that requirement is encapsulated by the notion of ‘publicness’, by which is meant ‘the claim for law that it has been wrought by the whole of society, by the public, and the connected claim that law addresses matters of concern to the society as such.’34 The key idea, strangely familiar to private international lawyers, is that

in choosing to claim to be law, or in pursuing law-like practices dependent on law-like reasoning and attractions, or in being evaluated as a law-like normative order by other actors determining what weight to give to the norms and decisions of a particular global governance entity, a particular global governance entity or regime embraces or is assessed by reference to the attributes, constraints and normative commitments that are immanent in public law.35

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31 Ibid., paragraph 7.677. Emphasis added.
33 Ibid., paragraph 379.
2. INVESTMENT ARBITRATION AS GLOBAL GOVERNANCE

The *lex mercatoria* has long bewitched and bewildered international private lawyers and legal theorists: does it even exist, is it 'law', what does it consist of, should it be recognized by domestic legal systems? Under conditions of economic globalization, business transactions among ‘strangers’ are increasing rapidly. From that light, it should not be surprising that there has been a boom in international commercial arbitration- and that international arbitration now has taken on a significant role in global economic governance. Perhaps less obvious is the recent rapid growth of the investment arbitration industry, coming on the heels, with a logical lag, of the explosion of the number of Bilateral Investment Treaties concluded in the 1990s. On the one hand, investment arbitration borrows largely from the machinery, ethos, and even personnel of commercial arbitration: on the other hand, investment arbitration applies public international law and cannot rely on the doctrines of party autonomy and privity in the same way as commercial arbitration does. Indeed, it has been suggested with force that investment arbitration should really be seen as a species of public law- a global administrative of sorts.

This is not, obviously, the place for an assessment of the investment arbitration regime. Instead, one issue with particular implications for the regime’s interaction with other legal orders will be briefly discussed. Investment treaties generally provide for two different kinds of standards of protection. The *relative* norm of non-discrimination prohibits host states from treating foreign investors worse than domestic investors. The *absolute* obligations of compensation for expropriation and of providing ‘fair and equitable’ (FET) treatment, on the other hand, apply regardless of whether domestic investors are entitled to similar treatment under domestic law. For the FET standard, in particular, there was traditionally little doubt that it was triggered only in cases where the treatment afforded the investor was so awful and shocking that it would have offended international fundamental rights standards regardless of the nationality of the investor. In the hands of investment arbitration tribunals, however, the FET standard has been stretched far beyond the minimum standard of treatment of aliens under customary international law, and has been taken to imply an obligation on the host state to guarantee a ‘stable legal and business framework.’ This, in turn, leads to the situation where investment tribunals hold host States to fall foul of international law obligations for treatment afforded foreign investors that would raise no issues at all under international law when afforded to domestic investors: an ‘international public policy’ exception of sorts to the application of domestic regulation to foreign nationals.

Tribunals have taken to defend this stance theoretically by an argument based on the absence of participation rights for foreigners in the political process. As the *Loewen*
Tribunal argued in the context of NAFTA’s Chapter 11, the object of investment law is to ‘protect outsiders who do not have access to the political or other avenues by which to seek relief from the nefarious practices of governmental units.’ Usually, the argument is limited to balancing exercises between the legitimate property rights of investors on the one hand, and the legitimate right of States to legislate and regulate in the public interest, on the other. As the Quasar Tribunal recently held in the context of the alleged expropriation of Yukos:

Moreover, where the value of an investment has been substantially impaired by state action, albeit a bona fide regulation in the public interest, one can see the force in the proposition that investment protection treaties might not allow a host state to place such a high individual burden on a foreign investor to contribute, without the payment of compensation, to the accomplishment of regulatory objectives for the benefit of a national community of which the investor is not a member.

The Yukos litigation, however, pushed the argument much further. After all, the very same facts had been considered by the European Court of Human Rights which had held against a finding of an infringement of Article 1 Protocol 1 of the ECHR. It was thus up to investment tribunals to explain why investment treaties would go further than human rights law in protecting the property of foreign investors. The Quasar Tribunal came up with this:

human rights conventions establish minimum standards to which all individuals are entitled irrespective of any act of volition on their part, whereas investment-protection treaties contain undertakings which are explicitly designed to induce foreigners to make investments in reliance upon them. It therefore makes sense that the reliability of an instrument of the latter kind should not be diluted by precisely the same notions of "margins of appreciation" that apply to the former.

This is, of course, an extraordinary ruling- from a very distinguished Tribunal. The implication is that international investment law affords foreign investors standards of protection that are higher not just than the ones demanded of States in the treatment of their own nationals, but higher than the ones demanded of States under internationally agreed human rights standards. It poses several questions, both general and specific, about the interaction between investment law and other legal orders. Is a court, when called upon to enforce an award based on this type of reasoning, to accept that a foreign State is to be liable for treatment to an investor that, had it occurred in its own jurisdiction at the hands of its own public authorities, would not have given rise to concerns not just under domestic law but under international human rights law? Or, in the context of European Union law, can this reasoning to be reconciled with the Court of Justice’s insistence on the autonomy of EU law in Opinion 2/13?

In that Opinion, the Court of Justice famously objected to arrangements for the accession of the EU to the ECHR on the basis that it would affect the autonomy of EU law. This may seem strange, at first sight, in the light of Article 53 of the Charter of Fundamental Rights of the European Union, which reads as follows:

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43 Loewen v United States, Award of 26 June 2003, ICSID Case No ARB (AF)/98/3, 224.
44 Quasar v Russia, Stockholm Chamber of Commerce, Award, 20 July 2012, paragraph 23.
45 ECtHR, OAO Neftyanaya Kompaniya Yukos v Russia, Application 14902/04, Judgment of 20 September 2011.
46 Quasar v Russia, Stockholm Chamber of Commerce, Award, 20 July 2012, paragraph 22.
Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.

Obviously, then, the rights recognized by the ECHR itself can be no cause of concern. The Court of Justice, however, was anxious about the effects of the similar ‘valve’ clause in the Convention, Article 53 ECHR, which reads:

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

The Court’s fear is that, through the ‘backdoor’ of Article 53 ECHR, standards of protection of fundamental rights norms could be ‘imported’ into the EU legal order that go beyond those of the ECHR itself and that go beyond what ‘is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.’\(^47\) In the light of Opinion 2/13, then, it is hard to see how the Court of Justice could endorse the conclusion by the European Union of Investment Treaties that grant foreign investors portable rights to property that go far beyond either Article 16 of the Charter or Article 1 Protocol 1 of the ECHR.

\(^{47}\) CJEU, Opinion 2/13 of 18 December 2014, paragraph 189.
CONCLUSION

Private global governance and legal fragmentation have led to a world in a condition of legal pluralism. Different normative orders with competing claims and logics all strive for autonomy. Some of these regimes—the ones at issue in this paper—base their claims on their responsiveness to the needs of the global economy to isolate market-conform structures from the distortions caused by political contestation. But facile distinctions between ‘the market’ and politics, between nationals and foreigners, and between (market-facilitating) private law and (market-correcting) public law have been fatally undermined by the forces of globalization. Private governance regimes strive for acceptance and recognition: if we are to ‘make demands on the world’, private international law has a vital role to play in ordering the interaction of the various claims exerted by diverse normative orders, and in setting out requirements for acts of recognition.

As a discipline and a field of practice, private international law is used to the balancing acts involved with the need to take into account the effects of legislation on those beyond the realms of the political community by whom and in whose name the legislation was enacted; it is also attuned to the needs and demands of ‘others’ seeking protection by their own law in the face of adverse impacts of being subjected to foreign legal systems. If we are to avoid either autonomy or subjection, and if we are to manage political conflict through the mediation of the law, we need productive mutual interaction of legal orders, not mutual indifference and political domination in the name of its absence. In that sense, private international law is a vital regulatory tool for global governance.
REFERENCES

- Berman, Paul Schiff, Global Legal Pluralism (Cambridge: CUP 2012).
- Kläger, Ronald "Fair and Equitable Treatment" in International Investment Law (Cambridge: CUP 2011).


• Teubner, Gunther, Constitutional Fragments (Oxford: OUP 2012)

Biography

Dr Harm Schepel is Professor of Economic Law and Director of Law Programs at BSIS. He holds degrees from the University of Amsterdam (Drs.), the International Institute for the Sociology of Law in Oñati (LLM), and the EUI Florence (PhD), and was attached to the Centre for European Law and Politics in Bremen and the Centre de Théorie Politique at the ULB before joining Kent Law School in 2000. He has held visiting positions at the Catholic University of Portugal, the University of Amsterdam, and Columbia Law School. He sits on the Board of editors of the European Law Journal.
Upon request by the JURI Committee, this study provides an analysis of the operation of the Regulation for a European Small Claims Procedure. It examines the 2013 Commission proposal and its rationale for the changes while it also identifies a number of recommendations that should be included in the amendments of the Regulation. The study highlights that more efforts should be made in order to facilitate enforcement in consumer cases as well as in promoting and interconnecting out-of-court processes with the European Small Claims Procedure, particularly when these processes operate at national level and rely on distance means of communications.
### LIST OF ABBREVIATIONS

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<tr>
<td>ADR</td>
<td>Alternative Dispute Resolution</td>
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<td>ECC-Net</td>
<td>European Consumer Centre Network</td>
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<td>ESCP</td>
<td>European Small Claims Procedure</td>
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<td>FIN-Net</td>
<td>Financial Dispute Resolution Network</td>
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<td>ICT</td>
<td>Information and Communications Technology</td>
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<td>ODR</td>
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**The Regulation**


**Brussels I**


**Brussels Ia**

EXECUTIVE SUMMARY

Background
The European Small Claims Procedure Regulation (EC) 861/2007, implemented since January 2009, allows cross-border litigants to use a European written process with standard forms. The European procedure is available in all the Member States, except in Denmark, as an alternative to the national procedure for resolving civil claims under €2,000. The Regulation aims to provide an informal procedure, which does not require parties to have legal representation and sets short deadlines to ensure the expeditious resolution of cross-border claims. Judgments from the European procedure are enforceable in another Member State without the need for a declaration of enforceability (exequatur). After a number of studies were carried out, the European Commission decided in November 2013 to present a legislative proposal to expand its use.

Aim

• To examine critically the European Small Claims Procedure Regulation (EC) 861/2007 and the Commission proposal of 19 November 2013 as well as the existing studies which informed the Commission’s proposal.
  • To propose what further issues should be included when amending the Regulation.
  • The study briefly examines best practices in domestic small claims procedures in England and Ireland, particularly in the context of informal dispute settlement options, and proposes pathways so that the two redress options can complement each other.

Proposals

• Commission’s proposal is welcome, but this study found that more has to be done in terms of facilitating parties with information on where to obtain further assistance to enforce a judgment and in enabling links with ADR schemes.
• The synergy between the ESCP and ADR mechanisms would increase awareness and empower EU citizens.
• Consumers who cannot resolve their cross-border complaints through the European ODR platform should be invited to submit their claims directly, and preferably online, to the competent court.
• Claim and response forms should include clear provisions requesting parties to consider the use of ADR before and during the ESCP.
• National court-annexed ADR schemes that operate through distance means of communication should be extended for cross-border claims. These schemes should cooperate with the ECCs and nationally certified ADR schemes in order to provide these services in English and in other major EU languages.
**GENERAL INFORMATION**

### KEY FINDINGS

- The European Small Claims Procedure (ESCP) is offered as an alternative to the national procedures to resolve cross-border claims up to €2,000.
- It is a written procedure that only allows oral hearings in exceptional circumstances.
- The procedure is intended to be informal. Litigants can participate without legal representation using standard forms available in all the EU official languages.
- Judgments are enforceable without the need for an intermediary procedure to declare their enforceability.

Small claims procedures provide a middle ground between formal litigation and Alternative Dispute Resolution (ADR) methods, where low-value disputes can be resolved in courts through a less formal and expeditious judicial procedure.\(^1\) The European Small Claims Procedure (ESCP) is intended to be a user-friendly procedure that allows parties to resolve cross-border low-value civil and commercial disputes (up to €2,000) through a simplified procedure without the need for legal representation.\(^2\) This procedure is usually carried out entirely in writing, using standard forms available online in all languages.\(^3\) The ESCP is available to parties as an alternative to the procedures existing under the laws of the EU countries.

Member States determine which national courts have jurisdiction to give judgment in the ESCP and the Member States jurisdiction is subject to the rules of the Brussels I Regulation.\(^4\) Subject to the exceptions laid down in the Brussels I, the actor sequitur forum rei principle applies, meaning that defendants shall normally be sued in the courts of the Member State where they are domiciled. An important exception applies to consumers, who in many cases are given the option of bringing claims to their local courts.\(^5\) Member States must allow the submission of claims and other documents by post or via electronic means, removing the need to travel to another country. Oral hearings can only be required in exceptional circumstances, and they are encouraged to be held using distance means of communication in order to obviate the parties’ need to travel to the hearing. Furthermore, the main advantage of the ESCP is that judgments can be enforced without the need for an intermediary procedure to declare their enforceability –i.e. the exequatur.

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\(^1\) P. Cortés 'Small Claims in Ireland and the EU: The Need for Synergy between National Courts and Extrajudicial Redress' in N. Neuwahl and S. Hammamoun The European Small Claims Procedure and the Philosophy of Small Change (Les Éditions Thémis, 2014).


1. EVALUATION OF THE EUROPEAN SMALL CLAIMS PROCEDURE

KEY FINDINGS

- On average the ESCP has reduced the cost of litigating cross-border cases up to 40% and the duration from 2 years and 5 months, to 5 months only –while this is a significant improvement, it is often too expensive and too long for many small claims.
- The use of the ESCP has been very low.
- It removes the parties’ requirement to have legal representation –though in practice one third of users employ a lawyer.
- Lack of legal representation can impact on the principle of equality of arms of an adversarial judicial process.
- The main obstacles identified by the Commission were the lack of awareness about its existence as well as unpredictable costs and time in litigating small claims.
- Unlike with ADR processes, EU citizens still find the ESCP too complicated and they do not feel confident to start it on their own.
- It will be important that research is carried out to find out who the beneficiaries of the ESCP are –as currently it is unclear whether these are consumers, SMEs or others –and which steps, if any, can be taken to make the procedure more user-friendly, faster and more cost-effective.
- ECC-Net and many other consumer bodies have observed that the main obstacle to the effectiveness of the ESCP is the enforcement in consumer cases.
- There is a need to complement the ESCP with more effective and informal out-of-court redress options.

The ESCP increases access to justice as it makes it easier to bring a cross-border claim within the EU. The Commission has reported that on average the ESCP has reduced the cost of litigating cross-border cases up to 40% and the duration from 2 years and 5 months, to 5 months only.\(^6\) This is a significant improvement, but it is still too expensive and too long for many small claims, which could benefit from quicker and more informal resolution. Indeed, during this time consumers complainant will feel frustrated and they will be encouraged to publish negative postings that will damage businesses reputation, while businesses complainants with unpaid invoices may not survive the wait.

**Two-thirds of those who used it were overall satisfied with the procedure.**\(^7\) Some of the most obvious advantages are that the ESCP offers claimants a judicial procedure that is the same in every Member State. It is also a fast track process with strict deadlines.

The Regulation removes the parties’ requirement to have legal representation – though in practice one third of users had to employ a lawyer.\(^8\) This feature of the Regulation has affected the national small claims procedures –for instance, in Spain the requirement to have legal representation was increased for claims over €900 to claims over

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\(^8\) Ibid.
In addition, the claim and response forms are available online in all the EU languages and just over half of the users (62%) found them easy to fill in. The ESCP thus attempts to facilitate self-representation, and so it does not require parties to make any legal assessment to support their claims. It is however obvious that submitting a claim presupposes that claimants are at least aware of their legal rights. It must be noted that while limiting and discouraging legal representation may keep costs down, making the process more proportionate to the value of the claim, it could also raise access to justice concerns. Indeed, consumers as claimants are more likely self-represented, which can impact on the principle of equality of arms in an adversarial judicial process to their detriment.

Great expectations have been put on the ESCP to increase access to justice for European litigants with cross-border claims. However, its use has been very low – it has been estimated 3,500 cases in the year 2012. The three main obstacles identified by the Commission were: (i) the lack of awareness about the ESCP; (ii) disproportionate costs and time in litigating small claims; and (iii) the lack of transparency about the costs of litigation and the methods of payment.

Research carried out in the EU concluded that there was a significant lack of awareness, where only 12% of EU citizens are aware of the ESCP. More surprisingly, only half (53%) of the judges and courts of the Member States are aware of the ESCP; and out of those courts that are aware, many are not fully informed about the ESCP. The European Parliament has called for the Commission to take immediate steps to ensure that consumers and businesses are made aware of the availability of the ESCP. In its response, the Commission developed a number of activities to increase awareness: the publication of general information about the ESCP and the court forms in various European websites (e.g. European Judicial Network, European Judicial Atlas, and e-Justice portal); running a number of training modules for judges and lawyers and workshops for trainers; the provision of a user guide for citizens and lawyers; and financial support to the European Consumer Centres (ECCs), which in turn provide consumers assistance on how to participate in the ESCP.

The other two obstacles identified are related to the unpredictability of costs and time employed for resolving a cross-border claim of small value. Parties often face uncertainty about the potential costs related to translations, travelling, lawyers’ fees, and there is a lack of clarity about the details of the procedure. Previous research has already noted that national small claims procedures generally only benefit well-informed and
articulate individuals. As a result, not only vulnerable consumers, but a large portion of society may not see the ESCP as an accessible redress option, which explains why research shows that the ESCP is rarely used. This situation contrasts with that of some national small claims procedures and ADR processes which are proving to be more effective.

Another key reason that neither the Commission, nor the Deloitte report mentioned as a main obstacle, is that, unlike with ADR processes, EU citizens still find the procedure too complicated and they do not feel confident to start it on their own. Accordingly, before further investment is poured into the system to raise awareness it will important that research is carried out first to find out who the beneficiaries of the ESCP are – as currently it is unclear whether these are consumers, SMEs or others – and which steps, if any, can be taken to make the procedure more user-friendly, faster and more cost-effective.

For instance, as it is discussed below in this report, both, the Eurobarometer and the Deloitte report found that there were no problems with the enforcement of judgments. This finding clearly suggests that the ESCP is mainly used by businesses which have legal representation and are often required to sue in the defendant’s forum. Hence, it is not used by consumers in their own jurisdictions, because if they used it, then they will surely have found great difficulties in seeking the enforcement of judgments in a different language and through a foreign enforcement procedure. This is why the ECC-Net and many other consumer bodies have observed that the main obstacle to the effectiveness of the ESCP is the enforcement.

Although there is limited empirical research comparing the ESCP with extra-judicial or ADR options (e.g. mediation or ombudsman schemes) to resolve low value claims, it appears that the latter, when available, is a more informal and cost-effective option that offers a higher degree of satisfaction amongst its users. Judicial and ADR options (saved for arbitration) are not often mutually exclusive, rather they complement each other. Indeed, best practices recommend parties to consider the most informal and cost-efficient way of resolving disputes, which is often ADR, and only when they cannot find a satisfactory resolution, then to choose the court avenue. The European Commission also concluded that there is a need to complement court access to justice with more effective and informal out-of-court redress options. Yet, with regards to the ESCP, there does not seem to be any articulated channels to complement these redress options.

23 Eurobarometer 395 p. 79.
24 I would like to thank Prof Christopher Hodges for raising this point.
26 ECC-Net, ‘European Small Claims Procedure Report’ (2012) p. 22. See also the discussion below in part 3 of this Study.
2. COMMISSION’S PROPOSAL OF 19 NOVEMBER 2013

**KEY FINDINGS**

- The Commission proposal amends the European Order for Payment so that, when a defence is submitted, the procedure will continue through the ESCP when the claim falls within its scope.

- Lifting the financial limit from €2,000 to €10,000 will benefit mainly small and medium enterprises, while the costs of litigating these claims are likely to remain similar. The threshold should be the same for natural and legal persons.

- Expanding the definition of cross-border cases to include all cases that are not entirely domestic. With the entry in force of Brussels I Bis, the removal of the exequatur from national procedures may encourage the use of the national small claims procedures instead of the ESCP, especially so when the claimant is able to sue from his own jurisdiction. If this happens, it may put an additional burden on defendants, who in most cases will not have benefited from participating in a written procedure.

- Requiring courts to use electronic means of communication is welcome but it will require investment and Member States may need additional time to install the new equipment. A pan European system, such as the e-Codex pilot, or a centralised single national court would benefit from economies of scale and the use of a specialised court.

- Requiring courts to use distance means of communication for conducting oral hearings and taking of evidence will remove the need to travel for oral hearings. The right to a fair trial will be respected as long as the individuals retain the right to appear in court.

- A €35 as the minimum fee can be effective in discouraging frivolous claims while allowing small claims. However, setting a maximum limitation on court fees at 10% may still be too high for the highest value claims. The cap could be set by the Member States, but it should never be higher than that required in their national procedures. Alternatively, a progressive fee scheme should be established, lowering the cap to 5% when claims go over €2,000. To ensure the effectiveness of the processes, these caps could also be extended to the enforcement process.

- Requiring Member States to ensure the availability of distance means of payment of court fees may find opposition in some Member States, but remains essential to enable an effective ESCP.

- Limiting the requirement to translate the part of the judgment of Form D will cut down on the costs of enforcement.

- Increasing the information obligations in respect of court fees, methods of payment of court fees and the availability of assistance in filling in the forms are a welcome development. But it remains unclear whether a party who has to submit the claim or a response in another jurisdiction would be able to obtain this assistance in his local court. Also, lack of information on enforcement can be an obstacle.
On 19 November 2013 the Commission published a proposal to amend the ESCP Regulation. In doing so, it has also proposed to reform the European Order for Payment so that when a defence is submitted by the debtor, instead of going automatically to the national procedure, it will go to the ESCP if the claim falls within the scope of the ESCP Regulation. This is a welcome change, but it will not be addressed in this study, which focuses exclusively on the amendments made to the ESCP. The Commission has proposed the following key amendments:

- Lifting the financial limit from €2,000 to €10,000;
- Expanding the definition of cross-border cases;
- Requiring more use of electronic communication;
- Requiring courts to use means of distance communication for conducting oral hearings and taking of evidence;
- Setting a maximum limitation on court fees at 10% of the value of the claim;
- Requiring the availability of distance means of payment of court fees;
- Limiting the translation of the enforcement form to the actual judgment;
- Incrementing the information obligations of the Member States

### 2.1. Increasing the Small Claims Limit to €10,000

The ESCP Regulation has maintained the initial economic threshold at €2,000. This limit contrasts with that of some Member States, which have increased their limits for their national small claims procedures. The Commission noted that these changes have left the current limit outdated for dealing with civil and commercial cross-border claims. Arguably, this limit has always been too low. Although the ESCP reduces the costs of litigating cross-border claims, this cost remains disproportionately high, particularly for the lowest-value claims. According to the data collected on behalf of the Commission, presently costs range from €579 to €1,511 for parties without legal representation, and €3,011 for parties who have hired a lawyer. Leaving legal representation aside, the bulk of the remaining costs come from the translation of documents, court fees, costs for servicing documents, and, sometimes, the travel costs for attending hearings.

The formality of a judicial process can in itself be a barrier for small claims. The Commission noted that 45% of businesses would not take a case to court because the cost of doing so was disproportionate in terms of costs and lengthy proceedings. Similarly, most consumers are also unlikely to go to court for a small claim, especially if it is one under €786. Yet, it must be noted that while 71% of consumer claims are below €2,000 only 20% of business disputes fall under the €2,000 bracket. For that reason, as it is noted below in this study, litigants dealing with small claims should be offered more informal means of dispute resolution when these are available.

The proposal increases the economic threshold from €2,000 to €10,000. This increase is a welcome reform as lifting the economic threshold does not necessarily increase the cost of
litigating higher value disputes. In fact, the estimated cost of litigating a cross-border claim of €5,000 is very similar (and sometimes the same) to the cost of litigating a claim of €10,000. This change has also found support from the majority of stakeholders. According to a public consultation carried out by the Commission, 66% of respondents supported the extension of the economic threshold up to €10,000. This change is expected to benefit mainly small and medium enterprises since about 30% of cross-border commercial claims fall within the new bracket of €2,000 to €10,000. Yet, the same economic threshold should be maintained for natural and legal persons – this approach would avoid confusion amongst its users while it will provide litigants with a more cost-effective process without removing their rights to a fair trial.

Increasing the economic threshold will in turn increase access to justice for these cross-border claims which are often left as unmet legal needs. This amendment would therefore capture cross-border claims that would be otherwise withdrawn as well as claims that were never submitted in court, increasing the number of cases using the ESCP, and as a result its awareness.

2.2. Broadening the Definition of Cross-Border Cases

The Regulation applies when one of the parties is domiciled or habitually resident in a different Member State of the competent court. The proposal extends the scope of cross-border claims to include all cases that are not entirely domestic. The proposal includes cases where both parties are domiciled in the same Member State, but where the cross-border element of another Member State comes from the performance of the contract, the tort, or the country of enforcement. Similar to national judicial procedures, the proposed amendment would also allow claims to be lodged against third country residents.

The Regulation, similar to other EU instruments, states that Member States could extend the use of the ESCP for domestic cases. Although at the time of writing the ESCP has not been adopted for domestic claims in any of the Member States, a higher use of this procedure might increase the interest in expanding its use for national disputes. Conversely, the Regulation remains as an alternative procedure to the national ones offered for settling cross-border claims. However, until very recently the ESCP had an important advantage to the national procedure: the removal of the exequatur. This situation changes on 1 January 2015 with the coming into force of Brussels I a as it removes the exequatur for most national civil and commercial judgments. It must be noted that some differences remain in the enforcement process. Namely, the ESCP contains a review mechanism in the country of origin, which is further restricted under the Commission proposals setting a time limit of 30 days from when the defendant becomes aware of the judgment or from the commencement of the enforcement, while the Brussels I Bis maintains a public policy exception in the country of enforcement. Yet, the removal of the exequatur from national procedures may encourage the use of the national small claims procedures instead of the ESCP, especially so when the claimant is able to sue in his own jurisdiction. If this happens, it may put an additional burden on
defendants, who in most cases will not benefit from participating in a written procedure.

### 2.3. More Use of Electronic Communications

There are many reasons for introducing ICT in the courts, including the delivery of a more efficient justice system making the process cheaper and simpler as well as facilitating the collection and analysis of data. The use of technology in the court system was expected to grow organically as it did in other economic sectors, such as in communications and business transactions. However, the provision of ICT in the courts largely depends upon the political will to invest in it, and in times of economic turbulence, investment in e-Justice across the EU has been rather limited, often reducing, rather than increasing, in the investment of their civil justice systems. Furthermore, inserting ICT in the courts is a challenging task, where the expectations of those investments often proved too optimistic as many attempts to implement technology based projects achieved moderate improvements if not failures.\(^{45}\)

The full potential of the ESCP however will only be met once its written procedure becomes user-friendly and is assisted by online communications as foreseen by the ESCP Regulation.\(^{46}\) This is also what court users would want. According to a public consultation carried out by the Commission, \textit{63\% of respondents were in favour of using electronic means in the procedure and 71\% in favour of equipping courts with videoconferencing facilities.} This figure changes depending on the level of access to the Internet that citizens have. Currently, half of EU consumers shop online. This is particularly so in those countries where there is a high level of Internet penetration and where the majority of the population uses Internet services, such as online banking. However, the use of ICT has not been translated into the court system. Some Member States have provided in their national laws for the electronic submission of the ESCP claims and other documents, yet most Member States have not actually implemented this technology in their courts.\(^{47}\)

Currently the availability of electronic means of communications varies greatly amongst the Member States. While in some jurisdictions there is very limited or no possibility for the use of ICT in the courts, others have ICT tools in all the courts.\(^{48}\) In general terms, the incorporation of ICT in the court system can be carried out at two levels. On one hand, it can facilitate litigants and their representatives to communicate with the court through e-mail or online filing of documents, the use of video-conferencing for hearing, the electronic payment of fees, etc. On the other hand, courts may use an electronic means to communicate with other courts and enforcement bodies; they can also use case management tools for their own internal communications and access to files and databases.

The use of electronic communications is further encouraged in the Commission proposal as it believes that the greater use of technology would decrease the time involved in exchanging documents and the cost of attendance at hearings through the use of telephone and video conferencing. It is thus not surprising that online access to the ESCP has been listed as one of the top factors for encouraging litigants to take the case to court.\(^{49}\)

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\(^{46}\) See Cortés (2008) above pp. 94–95 arguing that the ESCP will become more accessible if parties could employ electronic communications.

\(^{47}\) See e.g. art. 33 of the Civil Procedure Code (Netherlands), art. 130a ZPO (Germany), and 135(5) Civil Procedure Code (Spain). See generally, Miquel Sala (2009) op. cit. 105-106.


\(^{49}\) Eurobarometer 395.
the aim of promoting the use of electronic communications the Commission has proposed
the following requirements:

First, when a national court offers electronic means of communications through its
national proceedings, including the lodging of claims, then they must extend its
use for the ESCP where a party has accepted such electronic means of
communications. Presently, there are a number of jurisdictions, such as Ireland,
England and Wales, which offer claimants the possibility of submitting their claims online
through a website platform. In Ireland under its Small Claims Procedure parties may submit
the claims under €3,000 (and the response or defence) online. In England and Wales
parties cannot submit all types of small claims online, but they can use the Money Claim
Online to submit money claims under £100,000 (c. €127,000). However, it must be
highlighted that both parties must have a domicile in the same country in order to use the
online features of these procedures. So, although these two national procedures have been
running successfully for nearly a decade, they have not been extended to cross-border
cases, where litigants could also reap the benefits of using electronic means of
communications.

Secondly, when documents need to be served, the Commission proposal gives the choice
to the national laws to choose between the postal service and the electronic
service. Under the current Regulation the electronic service can only be used when the
postal service is not available. The amendment allows for electronic service under two
conditions: (i) when a party has expressly accepted to be serviced electronically, and (ii)
when the service is accompanied by an electronic means to attest an acknowledgement of
receipt that includes the date of delivery. However it would be preferable to
courage electronic communications as the preferred method, while recognising it
valid only when the respondent acknowledges electronically the receipt within the specified
timeframe. Only when the respondent does not acknowledge the receipt, the postal
delivery should then be required. Fee discounts could be used for parties who decide to
use the digital channel in order to discourage less efficient and more expensive paper and
telephone options. This is what Money Claims Online does in England and Wales.

Lastly, for the rest of written communications between the courts and the parties,
electronic means of communications will be preferred to the postal service. Yet,
importantly, when the electronic means are available, parties would still be able to choose
the traditional postal service for all the communications, including the submission of a
claim, the service of documents, as well as the rest of communications. Therefore, the
Commission’s proposal is welcome as the use of ICT is not imposed on to the litigants, but
only to the courts.

50 Draft art. 13(2) ESCP.
51 It should be noted that the Deloitte Study incorrectly states that it is possible to submit small claims in England
and Wales; this is only the case for money claims. Deloitte Report, Executive Summary, p. xii.
52 Draft art. 13(1) ESCP.
53 Darin Thompson observes that this approach should be extended to other elements of the judicial process, such
as with the identification of the parties, using electronic versions of evidence, and text-based testimonies
submitted electronically –and only when this is not possible, to require physical or video verification. D. Thompson
54 D. Thompson ‘Addressing ‘New’ Challenges to ODR Implementation’ System’ Society for Computers & Law (24
55 Money Claims are simplified procedures which are
particularly suited for being supported by technology means. In Money Claims the claimant –who is a creditor–
has written evidence of the debt and requests the court to make an order of payment. The debtor may choose to
contest the creditor’s right, in which case an ordinary civil procedure will be initiated. In practice, however, the
great majority of claims are not contested. In these cases the court order affirming the creditor’s right is issued
without the need of a hearing. The online system issues more claims (133,546 in 2010/11) than any county court
in England and Wales. See R. Susskind, ‘Virtual Courts for the Internet Generation’ The Times (24 April 2014)
http://www.thetimes.co.uk/tto/law/columnists/article4070943.ece.
It thus remains questionable whether Council will accept a proposal that makes mandatory the provision of ICT in all their courts.\textsuperscript{56} Requiring courts to use of electronic means of communication is welcome but it will require investment and Member States may need additional time (at least 12 months after its approval) to install the new equipment. Providing a centralised system, such as e-Codex,\textsuperscript{57} would make it easier for national governments to agree to the change as it will not affect their national budget for civil justice.

Another option to reduce costs would be for Member States to concentrate all the claims into a single court, which would benefit from economies of scale. The Commission reported that a number of Member States have introduced a few specialised courts to deal with ESCP (e.g. Finland and Malta).\textsuperscript{58} Similarly, other jurisdictions, such as England and Wales, have developed specialised courts for money claims, which are also fully equipped with ICT tools. An additional benefit of having a single or even a small group of competent courts is that it would address the important issue of the lack of awareness about the ESCP amongst the court staff, though this approach would not necessarily raise awareness amongst potential litigants.\textsuperscript{59} Another advantage of a single court is that they may have adequate expertise on how to apply the Brussels I, as it has been noted that currently not all courts apply it correctly.\textsuperscript{60} A final advantage of having a single court is that, with the aim of cutting the costs of translation, it may be feasible that these courts would operate in a second common language,\textsuperscript{61} which would inevitably be English.

\textbf{2.4. Imposing the Use of Distance Communications for Public Hearings}

The ESCP is essentially a written process, but in exceptional circumstances, when the competent court considers it necessary it may require an oral hearing. Although the Regulation encourages the use of electronic communications for the oral hearing,\textsuperscript{62} currently the majority of the hearings require the presence of the parties, witnesses and experts. According to the Commission, travel costs to attend an oral hearing are between €400 and €800, which discourages low-value claims as the costs for these claims would be disproportionate. The ESCP Regulation states that the rules of the ESCP are to be supplemented by the procedural law of the Member States in which the procedure is conducted.\textsuperscript{63} The national procedural law will also be relevant at the time of

\begin{footnotesize}
\begin{enumerate}
\item Deloitte Report, Executive Summary, p. xvii.
\item e-Codex pilot project on small claims is assessing the feasibility of a centralised online system for the ESCP, hence enabling European Union citizens and companies to process civil claims and deliver related documents online. The pilot enables European Union citizens and companies with a digital signature to process civil claims and deliver related documents online through the e-Justice Portal. The pilot took place in the autumn of 2014 with several participant Member States (Austria, Czech Republic, Estonia, France, Germany and the Netherlands). Similarly, in July, Austria, Estonia, Germany and Italy started piloting on the European Order for Payment. See http://www.e-codex.eu/about-the-project.html.
\item European Commission Report 2014, para. 4.1.
\item ECC-Net Report 2012, p. 20.
\item ECC-Net 2012 Report p. 22.
\item ECC-Net 2012 Report p. 4 and Guinchard, p. 305.
\item Art. 8 and 9.1. National courts can also take advantage of the provisions set in the Evidence 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 seeks to improve, which simplifies and accelerates the cooperation between courts in the taking of evidence. The support of ICT has also been reinforced by all the EU institutions. See Opinion of Advocate General Jääskinen delivered on 6 September 2012 (1) in Case C-332/11 at para. 64 which states “Member States should encourage the use of modern communication technology. The court or tribunal should use the simplest and least costly means of taking evidence.” See DG JUSTICE, European Commission ‘Practice Guide for the Application of the European Small Claims Procedure’ p. 47 Available at https://e-justice.europa.eu/fileDownload.do?id=1bc12074-2018-440f-bb6b-570d03f341f2 Practical Guide on Using Video-Conferencing under the Evidence Regulation http://ec.europa.eu/civiljustice/publications/docs/guide_videoconferencing_en.pdf.
\item Art. 19 ESCP.
\end{enumerate}
\end{footnotesize}
determining the necessity of the oral hearing and the collection and validity of evidence in compliance with the right of fair trial.\textsuperscript{64}

In general terms, the types of cases that are appropriate for a written procedure (online or by post) are those where the key documentation for assessing the merits is accessible in writing, such as with money claims. By contrast, \textbf{cases where there is little or no reliable documentation are less suited to written processes}. Interestingly, the Financial Ombudsman Services, which is the largest ombudsman scheme in the world, reported that it conducted three telephone hearings over its half million complaints received in the past year. Thus, nearly all its cases were resolved through shuttle negotiation, where an adjudicator or an ombudsman communicated with the parties separately, by either email or by phone.

\textbf{The Commission’s proposal further restricts the use of public hearings and requires the availability of distance communications for the oral hearings with witnesses, experts, and the parties.}\textsuperscript{65} Expert evidence and oral testimony would only be allowed when the evidence submitted by the parties is insufficient to render a judgment.\textsuperscript{66} Under the proposal an oral hearing can only be held when one of the following factors occurs: (i) when the written evidence is insufficient for the court to render a judgment; (ii) when it is requested by at least one of the parties and the value of the claim exceeds €2,000; and (iii) when both parties request it to conclude a court settlement.\textsuperscript{67} However, parties retain their right to appear in court if they decide to do so.\textsuperscript{68} This is in line with the interpretation of the right to a fair trial (article 6 of the European Convention of Human Rights and article 47 of the EU Charter of Fundamental Rights) which require that access to a hearing should be incorporated at least at an appeal or review route.

\section*{2.5. Capping Court Fees}

Currently, court fees vary significantly depending on Member State.\textsuperscript{69} The Commission believes that high court fees may be a factor for citizens’ decision not to pursue legal action,\textsuperscript{70} so it has proposed to set a maximum limitation for court fees.\textsuperscript{71} According to the proposal, court fees cannot be higher than 10\% of the value of the claim and the minimum fee to discourage frivolous claims cannot be higher than €35. Member States can decide on the method of calculation and the amount of court fees, but such calculation cannot include the interest, the expenses and the disbursements. This cap may encounter opposition in the Council. For instance, although the UK has announced that it is opting into measures to expand the use of the ESCP,\textsuperscript{72} it has also singled out its opposition to the capping of court fees.\textsuperscript{73} Concerns may be related to budgetary issues and the interest of applying a strict interpretation to Article 81 of the Treaty on the Functioning of the European Union.

\begin{itemize}
  \item\textsuperscript{65} Draft art. 8(1) ESCP.
  \item\textsuperscript{66} Draft art. 9(2) ESCP.
  \item\textsuperscript{67} Draft art. 5 ESCP.
  \item\textsuperscript{68} Draft art. 8(2) ESCP.
  \item\textsuperscript{69} Deloitte Report, Executive Summary, p. xiii.
  \item\textsuperscript{70} Impact Assessment p. 3.
  \item\textsuperscript{71} Draft art. 15a ESCP.
  \item\textsuperscript{72} Hansard, House of Lords Debate (25 Feb 2014) Column WS97. See also M. Cross, Government Opt in to Expanded EU Small Claims Track, Law Society Gazette (25 February 2014). Under a protocol of the 1997 Treaty of Amsterdam, EU legislative measures covering civil judicial cooperation do not apply to the UK unless it expressly opts in
  \item\textsuperscript{73} Hansard, House of Lords Debate (25 Feb 2014) Column WS97.
\end{itemize}
A minimum fee of €35 may be effective in discouraging frivolous claims while allowing to process most small claims. However, setting a maximum limitation on court fees at 10% may still be too high for the highest value claims (e.g. €1,000 in fees for a claim of €10,000). The cap could be set by the Member States, but should never be higher than that required in their national procedures. Alternatively, a progressive fee scheme should be established, lowering the cap to 5% when claims go over €2,000 (e.g. the cap for a claim of €3,000 would be €250, while for a claim of €10,000 would be €600).

The proposed cap for the court fees does not appear to extend to the enforcement stage, which takes place in a court of a different Member State. This fee would vary depending of the Member State. For example, in England and Wales this fee is normally £60 (c. €75). It must be noted that even though this fee would be an additional cost added in the process, such fee may be recoverable from the defendant at the point of the enforcement. The same rule is applicable to court fees, which may be recoverable according to the judgment issued by the country of origin. Thus, the cost rule remains unchanged, allowing the successful party to recover the costs, though the national court may not allow the recovery of costs in so far as these were unnecessarily incurred or are disproportionate to the claim. The recovery of costs may also include legal representation and expert witnesses, but these are often strictly limited with the aim of discouraging legal representation. In England and Wales the cap is set at £270 (c. €330) for legal representation and £750 (c. €950) for each expert witness.

2.6. Availability of Distance Means of Payment of Court Fees

At present some national courts require the payment of the court fees in their premises. In some cases the payment has to be done in cash, with cheques or by lawyers –these obstacle add more hurdles making claims unworthy to pursue. The proposal requires Member States to put in place distance means of payment of court fees, which can be processed through bank transfers, debit or credit card payments, or through online payments. It has been noted that the mandatory use of distance means of payments, as well as the capping of court fees and imposing distance means of communications, are amongst the sensitive issues for the Member States as these will affect their national budgets for civil justice. Unfortunately, electronic payments are not always as common as one might expect. For instance, in England and Wales county courts do not accept online payments for the ESCP, nor for its national small claims procedure, which has to be paid in the court house or sent by cheque – a payment method which is not common in many Member States. Hence, we welcome the Commission proposal for accepting distance means of payment of court fees. In this time and age, this type of facility in the courts is expected by the majority of European citizens and businesses, which can already send and accept electronic payments.

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74 Art. 16 ESCP.
75 Practice Direction 27 – Small Claims Track.
76 Impact Assessment p. 3.
77 Draft art. 15a ESCP.
2.7. Limiting the Requirement to Translate only the Substance of the Judgment of the Enforcement Form D

When a judgment is served on a defendant based in another Member State other than that of the court seized, the service must be done in a language that the defendant understands or in the language of the Member State where the service is affected.\textsuperscript{79} Hence, a translation is often required for an effective service.

A party who seeks to enforce a judgement will need to produce an original copy of the judgment and a certificate contained in Form D. Where a translation is required, often parties are required to translate the whole Form D. Indeed, only a small number of Member States accept Form D in more than one language. Since the Form D is a standard form already available in all the EU languages, the Commission has proposed to limit the translation requirement to Section 4.3 of the form, which contains the substance of the judgement.\textsuperscript{80} This is a welcome amendment as it would cut down on the costs of those seeking the enforcement.

2.8. Information Obligations

The ESCP Regulation already requires Member States to provide information on a number of issues, such as the competent courts, valid means of communications, the possibility of appeals, the accepted languages for the enforcement, the competent enforcement authorities, and the availability of practical assistance to litigants for filling the forms;\textsuperscript{81} though the latter information is not always available in practice. The Commission has reported that 41% of Member States do not provide such assistance to the parties and that 10% of citizens that requested this assistance did not receive it.\textsuperscript{82} Furthermore, the Regulation does not require Member States to provide information on court fees and payment methods, which in practice represent an obstacle for lodging a claim.

The proposal imposes information obligations on the Member States in respect of court fees, methods of payment of court fees and the availability of assistance in filling in the forms. This information should be free of charge and easily available on the Internet through both, online guidance and contact details on how to obtain personal advice. In addition, standard claim forms should be available in paper form and online in all courts with jurisdiction to process cases through the ESCP.\textsuperscript{83} It is hoped that greater information would improve transparency and, ultimately, access to justice.

In order to determine the jurisdiction the claimant will need to apply the Brussels I Regulation, so it is very unrealistic that an average consumer, even a well-informed one, would be able to do so without the assistance of someone with legal expertise.\textsuperscript{84} Indeed, sometimes even national courts dealing with small claims are not often acquainted with Brussels I. Under the Commission proposal the practical assistance will extend not only to determining the court with jurisdiction, but also to filling out the forms, calculating the

\textsuperscript{80} Draft art. 26 ESCP.
\textsuperscript{81} Arts. 11 and 25 ESCP.
\textsuperscript{82} Commission Report p. 7. See also ECC-Net Report and Eurobarometer 395.
\textsuperscript{83} Draft art. 4 and 11(2) ESCP.
\textsuperscript{84} E. Guinchard, "¿Hacia una Reforma Falsamente Técnica del Reglamento sobre el Proceso Europeo de Escasa Cuantía y Superficial del Reglamento sobre el Proceso Monitorio Europeo?" (2013) XII Anuario Español de Derecho Internacional Privado 229-308, 303.
interests, and identifying the documents that need to be attached when submitting the forms.\footnote{Draft art. 11(1) ESCP.}

\textbf{It is unclear whether a party who has to submit the claim or a defence in another jurisdiction would be able to obtain this assistance in his local court.} Nothing in the proposal impedes this assistance, but it would be helpful if the amendments spell out the extension of this obligation to assist individuals who have to submit a claim or a defence in another Member State. In addition, a number of ECCs have provided some free legal advice to consumers on the use of the ESCP. Yet, national ECCs have competence to provide advice to consumers only, which excludes small traders and businesses that could also benefit from this assistance. Thus, if the ECCs are expected to provide a more extensive and individualised support, especially to SMEs which often face similar barriers to those of consumers, this may require an increase in their budgets.\footnote{Ibid, p. 304.}

A more important issue is the information about the enforcement. Despite the fact that the Regulation requires Member States to provide information on the enforcement authorities, applicants often face difficulties in identifying not only the competent court, but also in the ability to understand the national procedure in the country of enforcement. This issue however has not been included in the Commission proposal.

The Commission proposal has developed the conditions for reviewing a judgment in the jurisdiction of origin (i.e. where the judgment was given) if the defendant was not served adequately or when there were extraordinary circumstances that did not enable him to contest the claim.\footnote{Draft art. 18 ESCP.} The judgment will be void if one of the former two circumstances are met, and if the defendant raises the issue within 30 days from the moment the defendant was aware of the judgment or the beginning of the enforcement. The limitation periods will be suspended during this period, but the review procedure itself remains governed by the national law.\footnote{Art. 21 ESCP.}
3. THE NEED TO FACILITATE ENFORCEMENT

**KEY FINDINGS**

- Research findings on the effectiveness of the enforcement appear to be contradictory.
- Empirical research should distinguish between those applicants who find out about the process of enforcement (when, for instance, the enforcement takes place in the same jurisdiction of the court which issued the judgment, or when the applicant has hired a lawyer) to those cases where applicants do not seek enforcement because of the lack of information and resources.
- Member States should facilitate details of how to contact lawyers who can assist applicants during the enforcement process. There would also be important improvements made if the enforcement procedures in the Member States could be accessible online.
- Another strategy which would diminish the problems related to enforcement is to divert suitable claims (but not judgments) to ADR schemes.
- An amendment should be included for appealed judgments to be enforced under the ESCP regime.

Judgments from a ESCP are enforceable in any Member State (with the exception of Denmark)\(^{89}\) without the need of going through the formal mutual recognition procedure for judgements.\(^{90}\) The enforcement requires an official translation of the judgment and it is subject to the national procedure—in other words, national court orders will be enforced in the same manner as those coming from other Member States.\(^ {91}\) A key issue in the enforcement stage is finding the appropriate court in the enforcing Member State. For example, Irish courts refer consumers who seek to enforce an order in their favour outside Ireland to the Irish ECC, which assists claimants through their ECC partners to identify the enforcement authorities in the country where the respondent is based.\(^ {92}\)

When a judgment from the ESCP needs to be enforced in another European jurisdiction, it can result in unforeseen costs, as the enforcing party may require legal advice in order to secure the enforcement. **Research findings on the effectiveness of the enforcement of the ESCP seem to be very contradictory.** The study carried out by Deloitte for the Commission found that there were no difficulties in the enforcement of judgments, with 97% of judgments enforced (23% of respondents said that the defendants complied voluntarily while 74% obtained a successful enforcement order).\(^ {93}\) This information led the Deloitte Report to state that there were no difficulties with the enforcement,\(^ {94}\) and accordingly, the Commission did not take measures to tackle this problem. However, the Deloitte study also stated that in more than four out of ten cases (42%) the case was still ongoing, without clarifying for how long these cases have been opened. A key question would be to assess which percentage of these cases were in the enforcement stage and who the parties who used the ESCP were. Indeed, the argument for lack of enforcement problems contrasts with the ECC-Net 2012 Report which stated that “a much bigger

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\(^{89}\) Art. 2(3) ESCP.

\(^{90}\) Art. 18 ESCP abolishes the intermediate measures of exequatur, whereby under the Brussels Regulation 44/2001 a second judgement is necessary before recognising a judgement from another country.[is this up to date with the entry into force of Brussels Ia? Please check]

\(^{91}\) Art. 21(1) ESCP.

\(^{92}\) ECC-Net, European Small Claims Procedure Report (September 2012) p.27.

\(^{93}\) Eurobarometer 395, p. 35.

\(^{94}\) Deloitte Report p. 65.
problem than the lack of awareness and other issues described before is the question concerning the enforcement of judgments."95 This is because the difficulty with the enforcement mainly arises when it is the consumer who uses the ESCP in his country of residence and then needs to enforce the judgment in a different Member State.96 The enforcement stage will often be in a different language and subject to a foreign national procedure. This problem has also been addressed in other ECC-Net reports which noted that "only a minority of the positive rulings made by the courts in consumers’ home countries are actually enforced across borders."97 Although this challenge has been noted by the Commission,98 the proposal has not taken any measures to overcome hurdles during the enforcement.

Empirical research should distinguish between those applicants who find out about the process of enforcement (when, for instance, the enforcement takes place in the same jurisdiction of the court which issued the judgment, or when the applicant has hired a lawyer) to those cases where applicants do not seek enforcement because of the lack of information and resources. Accordingly, it seems that the first group do not face difficulties in the enforcement, but the policy priority should be to find out how large the second group is.

Furthermore, a measure that would help with the enforcement is if Member States facilitate details on how to contact lawyers who can assist claimants in the enforcement process. There would also be important improvements made if the enforcement procedures in the Member States could be accessible online.

Another strategy that would diminish the problems related to enforcement is to divert suitable claims (but not judgments) to consensual ADR schemes, as settlements from these out-of-court schemes do not present problems with the enforcement.99

The appeal process, if available, remains subject to the national procedure. Hence, it remains unlikely that an appellate court decisions from an ESCP judgment could benefit from using the standard form D for its enforcement in another Member States since the court decision would be delivered not by the ESCP, but by a national procedure.100 The enforcement process would also fall under the Brussels I bis rules, and not under the ESCP Regulation that restricts the grounds for refusal. **It would therefore be desirable if the amendment included a provision that states that appealed judgments will be enforced under the ESCP regime.**

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96 Research found that only a minority of ESCP judgments made in the consumer’s jurisdictions in the UK are enforced in a different Member State. See A. Bradney and F. Cownie, ‘Access to Justice?: The European Small Claims Procedure in the United Kingdom’ in N. Neuwahl and S. Hammamoun The European Small Claims Procedure and the Philosophy of Small Change (Les Éditions Thémis, 2014) p. 118.
98 See Answer given by Ms Reding on behalf of the Commission to Ms Flasikova Benova’s Parliamentary Question E-003638-13 (6 June 2013) and to Mr Melo’s Parliamentary Question E-009293-12 (22 October 2012).
99 A study carried out on behalf of the European Commission found that ADR schemes that comply with the due process criteria established by the Commission have a compliance rate averaging 99%. See Civil Consulting, ‘A Study on the Use of Alternative Dispute Resolution in the European Union’ 16 October 2009.
4. THE PROMOTION OF ALTERNATIVE DISPUTE RESOLUTION OPTIONS

KEY FINDINGS

- The ESCP should encourage parties to consider ADR options and see court litigation as a last resort.

- Claimants should be asked in the claim form whether ADR was attempted and whether they would consider an ADR option if this were available as part of a court-annexed program. The respondent should be asked the same questions, and in the event that both parties agree to it, then ADR should be attempted.

- Parties should also have the option to request the court to stop proceedings for a short period of time while they participate in an ADR scheme. In addition, courts should have the discretion in recommending parties to attempt ADR.

- If parties have already reached an agreement, such settlement should be given the court’s stamp of approval obviating the need for a hearing.

- Court-annexed ADR schemes available for domestic disputes should be extended to cross-border claims falling within the scope of the ESCP. In order to deal effectively with cross-border claims, these ADR services should offer the use of distance means of communications and specialised third neutral parties (e.g. court-annexed mediators) who, in addition to their own national languages, can also offer the ADR services in English, and ideally in another major EU language.

- These ADR services could be provided by the ECCs on consumer matters and by other nationally certified ADR schemes for civil and commercial matters.

- ADR options should not be mandatory, especially if there is a fee involved.

- Courts’ power to impose cost sanctions should only be used exceptionally when they consider that one party has behaved wholly unreasonably in rejecting a settlement or in refusing to attempt an ADR scheme.

- The Online Dispute Resolution (ODR) Platform will be an optimum instrument to increase awareness about the ESCP by channelling consumer disputes, which could not have been resolved through ADR, to the competent national courts.

- The ODR platform could in due course incorporate a plug-in to e-Codex, enabling litigants and the courts to communicate through electronic means.

- A central online platform could be a very useful instrument for the public authorities to monitor the types of cases that go to the ESCP.
4.1. Alternative Dispute Resolution Methods are Suitable for Settling Small Claims

Access to justice, particularly in cross-border cases, is identified in connection, not only with the courts, but also with ADR/ODR schemes, especially in the consumer context as these extrajudicial processes are becoming the main route to ensure compliance, and hence enforce consumer law. Courts are increasingly seen as a last resort, performing a supervisory function rather than a default redress option for small claims. Litigants should be expected to explore more informal and cost-efficient redress options before embarking on a judicial process and thus settle more efficiently those claims that are ripe for early resolution. A higher level of voluntary settlements will not only increase parties’ satisfaction in the redress process, but will also facilitate a swifter and more effective compliance of resolutions. The advantage of an ADR process, such as mediation, is not simply offering the parties the possibility of achieving a quicker and cheaper resolution, but it is also a more informal process that often delivers higher parties’ satisfaction levels. These ADR processes are better adapted to deal with the new way of how claimants (especially consumers) complain. Often online forums, such as TripAdviser, Twitter and Facebook, can be used to damage businesses reputation, but also they can operate as important incentives to bring parties with small claims to the negotiating table.

The EU has recently approved legislation to ensure the availability of quality ADR schemes for consumers across the EU. The European Commission has also expressed its commitment to see the courts at the last resort and to promote settlements when this is possible. Accordingly, the ESCP should promote a more holistic redress model that combines judicial procedures with ADR options. This synergy would also assist in meeting the (often exaggerated) political claim that small claims procedures provide greater access to justice to the population.

The rationale behind the policy of setting the courts as the last resort varies depending on the countries, but there are two main drivers: the high cost of litigation and the time spent in resolving claims by overloaded courts. While English courts are often blamed for being too costly and Italian courts for being too slow, other jurisdictions with more cost-effective and efficient courts, such as Germany, still appreciate the appeal of ADR schemes given its informality and expertise. Whatever the reasons behind the need to promote ADR and discourage litigation, there is a common policy that seeks to identify which cases are suited for ADR and which cases are better suited for court litigation. One of the frequent methods to put this strategy into practice has been the use of court-annexed ADR schemes. Furthermore, consumer ADR schemes can process many more claims than small claims courts. In the England and Wales last year there were under 30,000 small claims that adjudicated by the court, while consumer ADR schemes resolved over half million claims.

104 Bradney and Cowrie (2014) op. cit. 123.
Consensual ADR methods can be effective in resolving those disputes where both parties are acting in good faith and are willing to reach an agreement. When two parties settle a dispute amongst themselves the result will be convenient for both of them; by contrast, when a dispute is resolved in court the final judgment is unlikely to satisfy both parties. As a result parties are more likely to comply with settlements crafted amongst them than when the outcomes are imposed by a court. The use of ADR is limited however to the parties’ willingness to participate in the process. Yet, ADR is more effective when combined with accessible and efficient civil court processes as they represent the most persuasive incentives for parties to sit at the negotiating table. While consensual ADR should be a complement, and not a substitute, to effective judicial redress, when effective ADR schemes are available they should be offered before the judicial options. This view is in line with those jurisdictions that justify in certain cases the use of mandatory mediation and are tilted towards the promotion of appropriate dispute resolution, which in any event leaves the courts as the final forum for adjudicating unresolved disputes.

It is particularly important for small claims to be channelled through an appropriate process, which should typically be the most cost-effective of those available to the parties. If this line of argument is to be followed, then it would be desirable for the ESCP to encourage more clearly the use of ADR and ODR. Currently, the only reference to ADR is made in Art. 12.3 of the ESCP Regulation, which simply states: “Whenever appropriate, the court or tribunal shall seek to reach a settlement between the parties.”

The Deloitte Report, upon which the Commission based its proposal, found that mediation offers “a quicker and less expensive solution for the creditor than initiating [ESCP] proceedings [...] if the mediation process can be expected to be successful. On the other hand, the existence of the ESCP protects the weaker party, offering him/her the possibility to take the stronger party to court if he/she refuses to engage in mediation. The ESCP thus functions as an incentive for the stronger party to contribute to a successful outcome of the mediation process.” Similarly, a number of ECC reports suggested that consumers often prefer informal redress processes than court processes, which are inevitably more formal than ADR schemes.

Yet, the only measure that the Commission proposal has introduced is contained in the proposed article 5(1), which states that national courts should offer parties an oral hearing when both parties declare their willingness to reach a court settlement. It is however unclear why an oral hearing would be necessary for this purpose. If parties have already reached an agreement, such settlement should be given the court’s stamp of approval obviating the need for a hearing. On the contrary, if parties need the assistance of a third neutral party to reach a settlement, then the instructing judge may not be the best person to provide this service as the judge may be required to adjudicate the case if parties were unable to reach an amicable settlement. Indeed, a preferred option would be a court-annexed scheme, such as those that already operate in some Member States such as in Ireland and England, which offer parties the services of a professional mediator or another third neutral party who assists litigants in reaching a settlement.

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107 Ibid.
4.2. Court-Annexed Schemes for Small Claims in Ireland and England

Under the pre-action protocols in England and Wales parties must consider the suitability of resolving their dispute through ADR (i.e. negotiation or mediation) before they lodge a claim in court. If this option is not considered, or if it is refused unreasonably by one of the parties, the judge has the discretion to impose legal fees on that party (regardless of whether they are successful in the proceedings). In addition, once a claim has been allocated to the national small claims procedure, the Small Claims Track, litigants are invited to participate in a mediation service, which is free of cost for the both parties. The mediation service is not means tested, so it is often abused by some large companies, such as a number of airlines, which as a rule do not comply with the pre-action protocol of considering mediation (when proposed by the claimant) but then opt in the free court mediation service once a claim has been lodged in the court. The service is normally done over the phone and has obtained very high satisfaction levels amongst users. The satisfaction is very high with both the service and the mediation (97%). Nearly 80% of those who attempt the mediation settle their claims successfully. Interestingly, the great majority (91%) of those who did not settle in mediation were still satisfied with the scheme, and most users (94.4%) stated that they would use the small claims mediation again.

In Ireland, in the event that a respondent contests the claim, the court clerk, called the Registrar, if he speaks the same language as the parties (e.g. when the disputes are between parties based in Ireland and the UK) will contact the parties and negotiate with each of them separately with the intention of reaching a pre-trial settlement. The same as the small claims mediators in England, the Irish Registrars may propose solutions when so requested by the parties. There is no officially available data for the settlement of ESCP claims, but over half of admitted domestic cases are settled by the Registrars before the trial. However, according to the Registrar in Dublin District Court, which accounts for nearly a quarter of the population in Ireland, during the first six months of 2013, the Registrar settled six out of the 26 claims received; out of the remaining, seven claims were undefended so a judgment was granted, and the remaining ones were at the time of the consultation at various stages of the process. These figures suggests that court-annexed mediation, if we can classify the Registrar’s role at that akin to a court mediator, carries out an effective role in settling cross-border cases.

The role of the Irish Registrars is more informal than that of the English mediators. In England each party is asked at the time of completing the allocation questionnaire whether

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112 HMCS leaflet EX301 ‘Making a claim- some questions to ask yourself’ p.1 “Court rules require you to think about whether alternative dispute resolution is a better way to reach an agreement before going to court. If you refuse to consider this, you may not get your costs back, or the court may order you to pay the other party’s costs, even if you win the case.” This has also become a practice in ordinary English civil procedures. See Burchell v Bullard [2005] EWCA Civ 358 and Halsey v Milton Keynes General NHS Trust [2004] 1WLR 3002. See generally S. Prince, ‘ADR After The CPR: Have ADR Initiatives Now Assured Mediation an Integral Role in the Civil Justice System in England and Wales?’ in Dwyer D (eds) Civil Procedure Rules: 10 Years On (OUP, 2009) 316-343.
113 I thank Jo Holland for raising this point.
114 J. Rustidge ‘Analysis of Qualitative Data Small Claims Mediation Service – April 2011 – March 2012’ HM Courts & Tribunals Service (11 April 2012) p. 4. The survey upon which this study is made received just over 2,200 responses.
115 Ibid, p. 5. It must be noted that this figure appears to have dropped over the last year. According to a recent report from the UK Ministry of Justice the settlement rate from April to October 2013 was 65%.
117 SCP [is this the Irish code of SCP? please clarify abbreviation] (1999) Rule 4 and 8 (1).
118 Email received by the Ms Bernie Moran, Registrar of the Dublin District Court (26 of June 2013). On file with author.
they are prepared to attempt mediation.\textsuperscript{119} Hence, the mediation service in England is more tightly regulated: parties are offered free of cost a one-hour shuttle mediation session (i.e. when the mediator speaks to the parties separately), which is normally provided over the phone by a professional mediator. In sum, litigants are invited to settlement talks once the day for the trial has been set. Respondents are often more willing to compromise and settle a meritorious claim than to have to participate in an oral hearing in front of the judge. Thus, since the ESCP is a mainly written procedure with oral hearings being exceptional, it may be more difficult for the neutrals to convince a respondent to settle a meritorious claim.

Although the overall percentage of claims settled is higher in Ireland (around half of all the defended claims), the settlement rate in mediations in England and Wales is higher for those claims where parties have agreed to participate in mediation (around two thirds of the mediations).\textsuperscript{120} It must be noted that there is a significant disparity in the economic threshold of small claims in these two jurisdictions –while in Ireland the limit is €3,000, in England and Wales the threshold is set at £10,000 (c. €12,700). It may be argued that the higher the economic stake, the more likely will be the appetite to fight the case in a court hearing. However, adequate incentives, such as progressive costs fees and exchange of information can also contribute to higher number of settlements. Indeed, most common law jurisdictions are characterised for having a very small number of civil claims reaching a hearing followed by a final judgment.\textsuperscript{121}

Unlike in Ireland, presently, the small claims mediation in England and Wales is not used for dealing with cross-border claims of the ESCP. In fact, mediators are not allowed to make international phone-calls. Moreover, mediators are not trained to deal with litigants based in different jurisdictions –let alone, with litigants who speak different languages.

4.3. A Proposal

The ESCP Regulation should encourage, but not compel, parties to attempt ADR options where these are available. To that end the Regulation should be amended in order to ensure that parties are well-informed and able to identify the most suitable method to resolve their dispute. It is recommended that when filling out the standard forms parties should be required to consider the suitability of ADR/ODR for resolving their claims. At this point parties should be informed about the availability of ADR methods, and the cost of these options if any, and how these would differ from a judicial process, so that litigants are empowered to make an informed choice. The claimant should be asked in the Claim Form A whether ADR was attempted, and if it was not attempted, the claimant should be asked whether he would like to attempt an ADR option if this is available as part of a court-annexed program. The respondent should be asked the same questions, and in the event that both parties agree to it, then ADR should be attempted.

\textsuperscript{119} Pt 27 Civil Procedure Rules (England and Wales) 1998.
\textsuperscript{120} According to the UK Ministry of Justice from April to October 2013 there were 26,670 claims referred to the HM Small Claims Service, but only 5,792 claims ended in mediation –the settlement rate of these cases was 65%.
\textsuperscript{121} For instance, in 2013 English and Welsh courts received 1,445,344 claims, out of which around 10 per cent (149,637) were allocated to tracks, only around 3 per cent (43,087) of the claims went to trial and received a judgment. The rest of the claims are either withdrawn or settled. In the last decade there has been some fluctuation in the number of claims submitted in courts, but certainly in England there seems to be some consistency in the decline of cases reaching the trial or hearing stage. This declined is particularly pronounced in small claims, which account by almost 70 per cent of the total number of hearings. S. Prince, Draft Report for the ODR Advisory Group, Working Paper on Policy Issues (July 2014) p. 5.
In addition, parties should also have the option to request the court to stay proceedings for a short period of time (e.g. 14 days) while they attempt to use an ADR scheme. Also, courts should be able to recommend parties to attempt ADR when they consider that it would be beneficial for them and when these ADR processes can be carried out by distance means of communication. In this regard the Court of Justice of the EU held that judicial protection was secured as long as electronic means are not the only means of accessing a settlement procedure for those parties without access to those means.122 This approach follows the line of the Mediation Directive and the EC Recommendation on Collective Redress. Both recommend and encourage parties to attempt mediation and other ADR processes before and during the judicial process. Furthermore, the Mediation Directive empowers courts to recommend mediation during the judicial process.

The ESCP Regulation should encourage Member States to enable channels so that disputes can be resolved by ADR through distance means of communication. Furthermore, in compliance with the principles of equivalence and effectiveness the ESCP Regulation should extend the offer of court-annexed ADR schemes to cross-border disputes if these services are available for domestic disputes, e.g. the one-hour free telephone mediation in England or the registrar’s mediation in Ireland. The ADR option could be offered either in parallel to the court system or as a model integrated in the court system. When settlements cannot be reached, cases should automatically return to the ESCP.

In order to deal effectively with cross-border claims, ADR services should be offered by specialised third neutral parties (e.g. court-annexed mediators) that in addition to their own national languages can also offer their services in English, and ideally in another major EU language. The specialised ADR schemes should also rely on the use of distance means of communications, such as the use of telephone and online case management tools complemented by translation software.

These ADR services should be provided with the support of the national ECCs when parties are involved in a consumer dispute and by other nationally certified ADR schemes when parties are involved with other civil and commercial matters. The name of court-annexed specialised ADR schemes should be communicated to the European Commission who should ensure that information is available in the EU websites.

ADR options should not be mandatory but offered to parties who have opted into these options, especially so if there is a fee involved. The consideration of ADR could be strengthened if courts have the power to impose cost sanctions when they consider that one party has behaved wholly unreasonably in rejecting a settlement or in refusing to attempt an ADR scheme. These sanctions should however be proportional and imposed only in exceptional cases.

The European ODR Platform, which the European Commission is due to launch in 2016, can be instrumental in increasing consumers’ access to justice as it could divert those consumers with cross-border disputes that could not have been resolved through ADR to the competent national courts. Ideally, this should be done through an online submission, though exceptionally regular post submissions may need to be allowed as the courts of most Member States may not be equipped to receive claims online.

122 Rosalba Alassini v Italia Telecom SpA (C-317/08) Para. 60.
The ODR Platform could also incorporate a plug-in to e-Codex, enabling litigants and the courts to communicate through electronic means. Furthermore, the ODR Platform could be instrumental in raising awareness about the ESCP. In so doing, the ODR Platform could improve consumer redress in a holistic manner, firstly, asking parties to explore the suitability of ADR schemes, and secondly, when out-of-court redress options are not available, to channel consumer claims to the competent court. Raising consumer awareness will have also a positive impact on businesses level of awareness about the ESCP.

Last, but not least, a central online platform could be a very useful instrument for the public authorities to monitor the types of cases that go to the ESCP. This information, if adequately captured, would be useful to the European Union when developing legal responses to improve cross-border trade. Monitoring frequent disputes will help to identify patterns upon which to build legal and practical responses that can lead to avoid the arrival of new disputes. This strategy will be more effectively than resolving disputes as isolated events.
5. CONCLUSION

KEY FINDINGS

- The Commission proposal is welcome, but this study found that more has to be done in terms of facilitating information on where to obtain further assistance to enforce a judgment and in enabling links with ADR schemes.
- Consumers who cannot resolve their cross-border complaints through the European ODR platform should be invited to submit their claims directly, and preferably online, to the competent court.
- Claim and response forms should include clear provisions requesting parties to consider the use of ADR before and during the ESCP.
- National court-annexed ADR schemes that operate through distance means of communication should be extended for cross-border claims. These schemes should cooperate with the ECCs and nationally certified ADR schemes in order to provide these services in English and in other major EU languages.
- The synergy between the ESCP and ADR mechanisms would increase awareness and empower EU citizens.

The development of effective enforcement mechanisms, such as the ESCP, should become a policy priority to stimulate the internal market. Cumbersome judicial processes for resolving cross-border claims drive out of the court system many individuals with valid claims who are left with unmet legal needs in an inefficient internal market. The rationale behind the Commission’s proposal is on one hand to tackle the lack of awareness and low use of the ESCP, and on the other hand aims to overcome certain deficiencies in the Regulation, such as its limited scope and the lack of use of distance means of communications.

The Commission proposal is welcome, but more has to be done in terms of increasing awareness. It is submitted that further amendments are necessary to facilitate information on where to obtain further assistance to enforce a judgment and in enabling links with ADR schemes. The promotion of ADR options is justified because parties’ satisfaction levels are often higher in settlements than they are in court adjudicated judgments. In addition, ADR helps litigants avoid overburdened courts and enables win-win solutions that can sometimes facilitate the continuance of cross-border transactions.

Consumers who cannot resolve their cross-border complaints through the European ODR platform should be invited to submit their claims directly, and preferably online, to the competent court.

The claim and response forms should include clear provisions requesting the parties to consider the use of ADR before commencing the ESCP as well as during the court process if there is a court-annexed ADR scheme available in the Member State of the seized court. National court-annexed ADR schemes available through distance means of communications should be extended to cross-border claims. These schemes should cooperate with the ECCs and nationally certified ADR schemes in order to provide these services in English and in other major EU languages. Yet, if litigants cannot find a resolution in an ADR process, they should be able to escalate the claim to the ESCP. The synergy between the ESCP and ADR mechanisms would in turn increase awareness and empower EU citizens.
REFERENCES

- European Parliament Resolution of 25 October 2011 on Alternative Dispute Resolution in Civil, Commercial and Family Matters (2011/2117(INI)).


Miquel Sala, R., El Proceso Europeo de Escasa Cuantía (Aranzadi, 2009).


Regulation (EC) 524/2013 on Consumer Online Dispute Resolution OJ L165/1.

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

- Susskind, R., ‘Virtual Courts for the Internet Generation’ The Times (24 April 2014) http://www.thetimes.co.uk/tto/law/columnists/article4070943.ece
Mediation as a form of Alternative Dispute Resolution offers substantial quantifiable and non-quantifiable benefits. The EU has played a valuable role promoting it among Member States, particularly through the Mediation Directive (2008/52/EC). Studies show that the most effective way to build reliance on mediation is to integrate a mediation step into appropriate civil and commercial cases. Yet, in its current form, the Mediation Directive leaves this to Member States to decide. Mediation levels are a fraction of what they could be, resulting in tens of billions of Euros wasted each year. Seven years after its adoption, it may be time to upgrade the Directive to incorporate an integrated mediation obligation for Member States.
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LIST OF ABBREVIATIONS

ADR Alternative Dispute Resolution
CEDR Centre for Effective Dispute Resolution
CEPEJ European Commission for the Efficiency of Justice
CMC Civil Mediation Council
CPR Civil Procedure Rules
MESO Mediation Enforcement Settlement Order
MIAM Mediation Information Assessment Meeting
ODR Online Dispute Resolution

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EXECUTIVE SUMMARY

Background

Alternative dispute resolution (ADR), particularly mediation, is making life easier for the citizens of the European Union (EU), but further reform and development are necessary to achieve its potential. The Mediation Directive of 2008 was issued by the European Parliament and the Council 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 (the Mediation Directive). The Mediation Directive builds upon nearly a decade of ADR reform in Europe with the aim to provide access to justice for citizens of the EU by establishing a balanced relationship between mediation and judicial proceedings. Citing a need for judicial cooperation and the proper market functioning of the European Community, the Mediation Directive provides a broad framework for Member States to adopt mediation into their domestic legal systems.

Today, Member States have effectively transposed the requirements of the Mediation Directive to varying degrees, yet the actual number of cases being mediated have remained disproportionately, and disappointingly low. To address this issue, the European Parliament commissioned a study to examine the cost-impact of mediation in the commercial context. The study, Quantifying the Cost of Not Using Mediation – a Data Analysis, (the 2011 Cost Study), found that even with very low mediation success rates, mediation could produce significant time and cost savings if integrated into the litigation process. The “EU Mediation Paradox” became apparent—if increasing the use of mediation brings such significant time and cost savings to the parties (and to the judiciary), why were Member States experiencing such low rates of mediation? This finding was particularly pronounced in the context of a global recession. The Legal Affairs Committee of the European Parliament went so far as to ask the European Parliament whether legal action was needed against Member States for their failure to achieve a “balanced relationship between the number of mediations and judicial proceedings” sought by the Mediation Directive. Consequently, a “Balanced Relationship Target Number” (BRTN) for Member States to achieve was suggested to realize this balance. As an outgrowth of this research, in 2013, the European Parliament commissioned a study to examine the status of mediation in Member States and establish the root causes of low levels of mediation. This study – “Rebooting” the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, (the Rebooting Study), which surveyed over 1,000 professionals in the EU and conducted case studies on each Member State, found that the most effective regulatory feature associated with a significant increase in the number of mediations domestically was an element of mandatory mediation.

The 2011 Cost Study and the Rebooting Study, read together, indicate that mediation objectively saved significant time and money, but in order to realize these savings, an element of mandatory mediation integrated into a Member States judiciary (Integrated Mediation) may be necessary to achieve a balanced relationship between the total number of mediations and judicial cases. Italy, for instance, requires parties to meet with a mediator before litigating in court at which point the party may opt-out of mediation and proceed to the judiciary. Once this system was adopted in Italy, the number of mediations jumped from a few hundred cases per year to over 200,000. Some mandatory mediation schemes, however, may not be practical. In Romania, parties were required to attend a mediation information meeting prior to initiating certain civil disputes outside of court. The Romanian Constitutional Court found the mandatory information meeting put an undue burden on litigants by causing them to “opt-in” to the court system. An instructive
approach between Italy’s “opt-out” method of integrated mandatory mediation and Romania’s “opt-in” may have been struck in the Alassini case of the European Court of Justice (ECJ). In that case the ECJ ruled on a challenge to Italy’s Electronic Communications Code, which mandated an attempt at out of court settlement prior to commencing a case. The ECJ in that case established a bright line, “safe harbour,” for mandatory out of court settlement systems. The bright line established mandatory out of court settlement must not: (1) result in a decision binding on the parties by the mediator; (2) not cause a substantial delay; (3) not suspend the period for time barring of claims; and (4) not give rise to cost, or are low cost.

**Aim**

Moving forward, since mediation has been defined, analysed, accepted and implemented, it may now be time to realize the result. To do so, establishing a Balanced Relationship Target Number, as suggested in the 2011 Cost Study, should be considered. The BRTN would require each Member State develop a target percentage or number of cases in proportion to the total number of civil and commercial cases – including cross-border – and report annually on their performance providing a key performance indicator (KPI). The BRTN would ensure Member States are in compliance with the Directive and allow for a quantifiable measure of the progress.

In addition, consideration should be given to adoption of an integrated mediation approach providing mandatory elements in mediation into their judiciary like those of Italy and in compliance with the Alassini framework. This approach has been shown to dramatically increase the number of mediations domestically with the potential to save disputants significant resources in the form of time and money. Member States may also wish to not take action on the Mediation Directive to avoid risk until more data can be obtained. An in-depth analysis is currently being written as a follow-up on the Rebooting Study to gather information on whether a balanced relationship exists now between mediation and the judiciary and whether integrated mediation would increase the number of mediations.

While Member States by and large have appropriate regulatory structures in place as required by the Mediation Directive, a balance between mediation and judicial procedures in Member States remains to be seen. It is now time for Member States to give thorough consideration of whether and how integrated mediation processes should be established in the Mediation Directive as a Member State requirement for appropriate civil and commercial cases.
1. INTRODUCTION

1.1. Mediation as Access to Justice

Mediation can be viewed as part of the most recent wave of development within the “access to justice” movement. In the European Union, although access to justice is recognized as a fundamental right, there are no codified definitions or comprehensive statements of the elements needed to constitute access to justice. But the phrase “access to justice” does currently have a generally understood meaning, originally recognized in the 1970’s, that broadly refers to claimants’ ability to avail themselves of the various institutions through which a claimant might pursue justice.

Before the 1970’s, however, the concept of access to justice had been much narrower, consisting only of the right to access to the courts. This more restrictive view would exclude alternative dispute resolution (ADR), such as arbitration and mediation, because ADR methods are, by definition, outside of the courts. Unfortunately, this institution-tied view still exerts residual influence today: opponents of integrating a mediation step into the judicial process often argue that mediation would constitute an obstacle to the parties’ rights of “access to justice”.

The more modern and encompassing view of access to justice has been well elaborated by Mauro Cappelletti, a leading Italian jurist and scholar, who describes it as “the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state … [which] … must be equally accessible to all … [and] … must lead to results that are individually and socially just.” Thus, under this more liberal view, access to justice has two aspects: equality of access and just outcomes, regardless of whether redress is sought through a court or through other means.

Overall, access to justice has evolved over three successive waves of development. The access to justice movement originally emerged in most western countries during the immediate post-World War II era. The “first wave” was the emergence of legal aid. This wave focused on providing access to legal representation in the courts for the economically disadvantaged, especially through the creation of more efficient systems of legal aid or advice. A “second wave” of change focused on group and collective rights. This stage of development brought class actions and public interest litigation to address systemic problems of inequality. Representation was also extended to diverse interest groups, such as environmentalists and consumers. It was in the “third wave” of development that access to justice began to include a range of alternatives to litigation in court for dispute resolution, as well as reforms to simplify the justice system and facilitate greater accessibility. In this phase ADR emerged as a means of securing access to justice. Cappelletti and Garth refer to this third wave as signifying the emergence of a fully-developed access to justice approach.

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2 Pinedo
4 Cappelletti and Garth. The notion of access to justice developing in waves was first introduced by Cappelletti and Garth.
5 Cappelletti and Garth.
1.2. Mediation as a Means to Alleviate Judicial Burden

As various studies for the European Parliament and Commission have shown, traditional judicial systems in Europe are heavily burdened by the costs and delays associated with courts and the litigation process. In addition, power imbalances and unfair treatment have significantly impacted citizens’ access to justice. Across the EU in 2013, the average time of resolution through the court system was 566 days—over a year and a half. The average cost of court litigation was over 9,000 Euros, effectively blocking many citizens from access to the formal court system to seek redress.

As a result of these and other systemic problems in accessing justice, the ADR movement has been steadily growing in both civil and common law jurisdictions. Over the last two decades, the EU has increasingly promoted mediation and other forms of ADR as mechanisms for achieving access to justice; in its 2002 Green Paper, the European Commission noted the “increasing awareness of ADR as a means of improving general access to justice.”

In previous reports, the European Commission for the Efficiency of Justice (CEPEJ) has stated not only that “[a]ccess to justice may . . . be facilitated through the promotion of Alternative Dispute Resolution,” but also that “these policies . . . should be further developed.” Of all the various ADR processes, mediation, in particular, has been at the forefront of EU discussions about access to justice and efficient dispute resolution. Notably, the Committee of Ministers of the Council of Europe has adopted several recommendations promoting mediation and CEPEJ has recommended that member states should be encouraged to further develop mediation procedures.

This shift toward mediation, in preference to other methods of ADR, suggests that mediation is advancing the access to justice movement. Mediation can serve as a process that complements and works alongside the formal justice system. As has been shown in various studies, mediation not only reduces the workload of the courts (thus improving the availability of judges for cases that must go through the traditional justice system), it also significantly reduces the time and cost of dispute resolution.

Access to justice, especially for the poor and disadvantaged, is best facilitated through mediation, which is well equipped to addresses many of the key obstacles facing these groups. As the most recent CEPEJ report notes, a majority of the Member States provide some form of legal aid for mediation procedures. In addition, from a rights-based perspective, successful mediation results in a settlement, which often provides a win-win solution, with both parties satisfied with the result. More broadly, the expanded use of mediation and alternative dispute resolution mechanisms has become a significant factor in ensuring confidence in the legal framework as a whole, thus allowing more citizens to feel confident seeking redress.

Mediation’s prominence as an access to justice vehicle in the EU was enhanced by the Mediation Directive issued in 2008 by the European Parliament and the Council. Among the stated goals of the Mediation Directive is improving access to justice (especially for the

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7 Rebooting Study


9 CEPEJ 2014 Report
average citizen with low-value claims) by simplifying the mediation process. The Mediation Directive, whose features will be explained in detail below, required Member States to implement structures to support mediation of cross-border commercial disputes in the EU by May 2011. The Mediation Directive highlighted the importance of facilitating access to ADR and promoting the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial procedures (required in Article 1). Consequently, securing better access to justice through mediation, as well as through other methods of alternative dispute resolution, can now be said to be part of the established policy of the European Union.

1.3. Non-Quantifiable Benefits

This In-Depth Analysis explores mediation as a form of access to justice, and seeks means to maximize the benefits by exploring ways to increase the use of mediation to resolve disputes. In doing so, it focuses on significant opportunities for cost savings and time savings if mediation were used more. In addition to very substantial cost and time savings benefits set out below, mediation also brings many benefits that are unquantifiable, but are just as important. These include mutual satisfaction of the parties to a settlement agreement, specially tailored solutions, greater compliance, win-win outcomes (rather than win-lose), empowerment of the parties, equalization of weak/strong party imbalances, preservation (or reestablishment) of relationships, and amicable termination of relationships, to name a few. While this In-Depth Analysis emphasizes cost and time savings opportunities, these very significant non-quantifiable benefits should be considered as well.
2. MEDIATION AND ARBITRATION DEFINED AND DESCRIBED

This In-Depth Analysis addresses mediation as a general form of ADR in civil and commercial cases in the EU.\textsuperscript{10} Mediation within the EU, however, is only one option on a rather large range of services available to disputing parties, each addressing the various needs of the parties and the peculiarities of the underlying dispute.

A relatively broad list of modern ADR mechanisms ranges from arbitration, to mediation, to negotiation, and to facilitated discussions, and includes some hybrid methods. The principal shared characteristics among all ADR mechanisms are that they:

1) involve addressing disputes outside of, or at least partially outside of, the formal judicial system (and, consequently, reduce reliance on traditional judges and complex civil procedures and appeal processes);
2) involve engaging a professional or panel of professionals who are neutral and independent in order to address the dispute; and
3) depend upon agreement among the parties at the outset (arbitration) or throughout the process (mediation) in order to carry out the process.

The types of ADR vary significantly but can be viewed on a spectrum tracking the decision-making power of the neutral versus the control by the parties over the process. At one end of the spectrum, the neutral’s decision-making power is absolute and binding, and the procedures tend to be rigid and formalistic. At the other end, the neutral has no decision-making power at all, and the parties retain much more control over the process.

\textsuperscript{10} The discussion of ADR in this In-Depth Analysis encompasses ADR in the civil and commercial dispute context. There are ADR mechanisms and possibilities in criminal justice, but these are beyond the scope of this In-Depth Analysis. Except where specified otherwise, references to ADR address ADR in the civil and commercial dispute resolution context.
2.1. Arbitration

Arbitration represents the strongest decision-making power on the part of the neutral. The neutral serves as a final decision-maker, issuing binding and non-appealable decisions on the dispute or on critical issues within the dispute. Arbitration has enjoyed general awareness and formal recognition extending back into the eighteenth century, and it is, consequently, more deeply established. In arbitration, parties usually agree on detailed rules of information-sharing, applicable rules of evidence, the role of expert witnesses, direct and cross-examination of witnesses, and other formalities. There are various types of arbitration, ranging from those where the decision determines specific issues or facts, applicable law, and/or range of damages in a larger dispute (Special Issue Arbitration) to those where the decision resolves the entire dispute (General Arbitration).

Some arbitrations employ a variant of game theory to resolve disputes. For example, in bracketed arbitration, the parties establish a result range that is not shared with the arbitrator, and they agree to be bound by the arbitrator’s decision but only to the extent of the range agreed to among themselves. Overall, the neutral’s role in arbitration processes is to issue a decision, not to broker an arrangement between the parties. The decision is not appealable and is usually available to register and enforce as a court judgment.

2.2. Mediation and Hybrid Models

Developed more recently, in the second half of the twentieth century, mediation also offers a broad range of types that vary based upon the needs of the parties. Common to all types, however, is that there is no binding decision by the neutral, although any agreement reached by the parties may include provisions for enforcement as a court judgment where provided for by law.
**Pure facilitative mediation** represents the far end of the mediation side of the spectrum. The neutral is normally called a “mediator” and works to get the parties to reach agreement on some or all of the disputed issues between them. In pure facilitative mediation, the parties have significant power to shape the process and have agreed that the mediator exercises no decision-making power. The mediator works to build communication between the parties and to break down barriers with an ultimate goal of reaching agreement on the dispute or on key issues in the dispute.

**Evaluator mediation** is similar to facilitative mediation in that the neutral (sometimes called a conciliator) has no decision-making power. However, in evaluative mediation sometimes the neutral is provided with some degree of authority to evaluate the parties’ relative positions and provide opinions on the relative merits of the case or on particular issues. The evaluative mediator sometimes may offer a prediction on a likely outcome and urge discussion based upon that prediction. Based on the particulars of the case, the evaluator may also suggest value ranges for discussion. Nevertheless, it is still an entirely voluntary process, and no decisions are issued; the parties must still reach agreement if the dispute is to be resolved.

There are other, hybrid models that appear on the spectrum between pure arbitration and pure mediation methods. For example, **Early Neutral Evaluation**, involves presenting cases to an independent party, often called a “neutral evaluator”, who then renders a non-binding decision on the merits of the issues or dispute. The decision is usually written and accompanied by a detailed rationale. Since it is non-binding, the parties may then use the decision as a basis for further discussion. Early neutral evaluation can help parties identify and understand the relative strengths and weaknesses of their case and is often used where there are complex factual disputes or relatively ambiguous applicable rules. The procedures for early neutral evaluation are far less formal than they are for arbitration; the goal is for the parties to understand each party’s case, and there can be a fair amount of free-flowing, back and forth discussion. The result is usually a better understanding by each side of their relative merits, which can lead to settlement discussions and eventual settlement out of court.

The **Mini-trial**, or mock trial, is a more formalized method of ADR that still does not involve a binding decision. In a mini-trial, the parties agree upon a neutral, or panel of neutrals, and rules, and they present their case with relative formality that is similar to, but still far less rigid than, a court proceeding. The idea is for the parties to mimic the experience of a trial by exchanging exhibits, briefs that present each side’s case, and rebuttal documents that address the other side’s contentions. Formalized and rigid rules of evidence do not apply as they would in court. After presenting their respective cases, the parties may ask the neutral panel to issue a reasoned, non-binding decision. The parties may then use the decision to evaluate their respective positions.

No matter the particular type of mediation, the key elements of mediation that distinguish it from arbitration and other more formal types of ADR are that mediation-based mechanisms involve no power to impose decisions over the parties, and parties retain a greater degree of control over the process applied. Before there can be any enforceable result to mediation, the parties must reach agreement on the terms of settlement.
2.3. Best Practices in Mediation Systems

Over the years, professionals have developed relatively wide agreement on practices that are crucial for mediation to function effectively as a form of ADR. These practices are intended to assure parties that they will not be prejudiced by participating in the process. This assurance is important, because mediation is an entirely voluntary process. If the parties do not have confidence in the process, they will not participate in it. Although identified as “best” practices, the practices should instead be viewed as minimum requirements critical to the effective functioning of a mediation system. This section identifies those practices and discusses why they are important.

Protection of Confidentiality

The mediation process encourages parties to mutually disclose private information and opinions in order to generate possibilities for settlement. This information may need to be protected from public disclosure by the mediator as well as from disclosure to the opposing side. For example, a key technique used by mediators is to conduct a colloquy, or separate meeting, individually with each side in order to hear private concerns and learn private motivations or goals that apply to the dispute. In order to ensure this information can be shared in confidence, the mediator is bound by an agreement, or by applicable rules, to respect confidentiality. If there are no rules in place, or the rules in place are inadequate to protect this confidentiality, parties may find it very difficult to share private information with the mediator. True, a mediator that breaches confidentiality may find it very difficult to get future business, but the legal system must do its part as well. The legal system must provide that confidence, usually through effective penalties for unauthorized disclosure to the other side or in public.

Another aspect of confidentiality is an evidentiary one. In mediations, parties may make offers to settle or may take a position on a key issue that is ultimately unsuccessful. In the event the mediation is not successful and the dispute winds up in court, the discussions and offers made during the proceedings should not be admissible as evidence in the court case. To allow otherwise would greatly inhibit the flow of information during the mediation, as each party would constantly have to evaluate the risks of each disclosure. Mediation agreements almost always include waivers by each side stipulating that they will not be able to present as evidence in a later court procedure any information disclosed during the mediation process. A legal system’s rules should enforce these waivers. Evidentiary rules in a judicial system should prohibit discussions held during mediation from being raised as evidence in later court proceedings on the dispute, or at least limit the extent to which they may be.

A corollary to this prohibition is to preclude the mediator from being called as a witness in a later court case addressing the dispute between the parties. Parties are usually required by the mediator to waive any potential right to call the mediator as a witness in a later court proceeding on the dispute. Best practice legal systems will respect that waiver. To allow otherwise can significantly inhibit the flow of information critical to facilitating an agreement.

Time Limitations

Mediations take time to apply for, schedule, and conduct, and therefore mediation agreements usually provide for the tolling (pausing) of any limitations periods—periods in which a court case must be brought—during the pendency of the mediation. Failure to toll these time periods may work to the disadvantage of one or more parties, particularly if a period is expected to expire in the near future or if the mediation is expected to take
significant time. Consequently, mediation rules and mediation agreements often provide for applicable limitations periods to stop running during the pendency of the mediation. Best practice legal systems provide for these agreements to be honoured or otherwise automatically suspend the running of these time periods.

**Enforceability**

Settlement agreements reached in mediation often must be enforceable. The ability to enforce the agreement with the force and effect of a court judgment may be the difference between a full settlement and a failed mediation. If one side can offer a quick, certain, and enforceable judgment, it can be a powerful incentive for the other side to settle. Consequently, enforceability should be available as a negotiation tool for mediation settlement discussions. Providing for enforceability of most settlement agreements reached through mediation is a best practice for mediation-enabling environments.

**Quality Control**

As should already be clear from other best practices in mediation environments, the parties’ confidence in the quality of the process and the neutrality and professionalism of the mediator are critical to the role that mediators can play. Standardization and quality control mechanisms, public and private, play a role in establishing this confidence. State-level quality control mechanisms, such as required professional training, testing, and certification requirements, help establish minimum levels of professionalism in mediation and provide public confidence in this professionalism.

The degree and types of controls vary among systems, with some jurisdictions depending entirely upon privately-established certification and training systems, analogous to a guild or institute, and others imposing these controls though state or quasi-state entities, such as Ministries of Justice. Alternatively, they may be provided for at the mediation provider level, such as court-connected mediation programs or mediation referral programs. Whatever the form, quality control usually includes establishing codes of conduct for mediators and mediation providers, guidance on mediation agreements and standard waivers and protections, regularized training to enter the profession, and continuing education training to remain in the profession.

**Active Public Awareness**

While mediation availability in developed economies is often high, awareness of and reliance on mediation are often lower than might be expected relative to the potential benefits that can accrue to the parties. As discussed elsewhere in this In-Depth Analysis, the capacity to provide mediation does not mean that mediation is widely relied upon. The factors influencing mediation use are likely many, ranging from lack of awareness by the parties to active resistance by legal representatives. Many systems include training programs and clinics as part of lawyer education programs, while others depend upon active referral of certain types of cases by courts to mediation. Some of these court referral programs are developed within the court system, such as court-annexed programs, while others are outside the courts, such as mediation referral programs or mandated mediation requirements as a pre-condition to case initiation or court hearings. Some mediation providers market their services through meaningful channels, such as networking, websites, and very occasionally, active advertising.
3. MEDIATION IN THE EU

Mediation is addressed and regulated at the EU level, and Member States largely have legislation and rules in place that allow for mediation and address the best practice/minimum requirements discussed above. Due to years of mounting concern about court costs, court congestion, and other obstacles to cross-border dispute resolution in the single market, the focus on mediation in the EU has steadily increased. A Directive addressing mediation regulatory environment is currently in place, and Member States are largely in compliance with the specific requirements. Nevertheless, there is still a long way to go: the number of mediations remains extremely low in relation to the number of court cases in Member States. How the Mediation Directive is addressed in the near future may have a significant effect on the rate at which parties will rely on mediation in the European Union.

3.1. Brief History of Mediation Regulation in the EU

The regulatory push at the EU level started with the October 1999 European Council of Tampere, which shifted from a “laissez-faire” approach to mediation and called for the Member States to create alternative, extrajudicial dispute resolution procedures. The efforts that followed spanned nearly a decade and culminated in the adoption of 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 (the Mediation Directive).

To fully cover the mediation regulatory environment in the EU, however, there are other relevant instruments that should be addressed.

The Recommendations

Before the adoption of the 2008 Mediation Directive, the European Commission had already endeavoured to promote greater use of ADR procedures in resolving consumer disputes by issuing two Recommendations: 98/257/EC and 2001/310/EC.

The 1998 Recommendation contains principles designed for ADR providers (bodies responsible for out-of-court consumer dispute resolution) to adhere to. This recommendation was designed to ensure that out-of-court procedures offer the parties minimum guarantees such as independence, transparency, adversarial principle, effectiveness, legality, liberty, and representation. However, this recommendation did not concern procedures that merely involved an attempt to bring the parties together to find a solution by common consent; instead, it only concerned those procedures designed to lead to settlement of a dispute through active intervention of a third party. Thus, mediation did not fall under the scope of this recommendation.

In 2001 the Commission issued another recommendation, adopting a new set of principles that also applied to consensual out-of-court consumer complaint resolution schemes, such as mediation. The principles of this recommendation were impartiality, transparency, effectiveness, and fairness.

The Consumer ADR Directive

to increase consumer protection. Member States were given two years to implement the Directive, with the Directive coming into force by July 2015. According to Article 1, the Directive aims "to contribute to the proper functioning of the internal market by ensuring that consumers can ... submit complaints against traders to entities offering independent, impartial, transparent, effective and fair alternative dispute resolution procedures."

The Consumer ADR Directive applies to domestic and cross border disputes that arise out of sales or service contracts (online and offline) between EU resident consumers and established EU traders. It applies in all economic sectors (subject to certain exceptions such as health and education) but does not apply to trader to consumer disputes and trader-to-trader disputes.

The Consumer ADR Directive requires Member States to ensure that:

- consumers have access to quality out of court ADR procedures to deal with any contractual dispute arising from the sale of goods or the provision of services between a consumer and a business;
- entities acting as ADR entities meet certain quality criteria including independence, transparency, expertise, effectiveness, and fairness, etc.;
- traders inform customers about ADR entities/schemes which cover the trader’s sector and whether or not the trader subscribes to those ADR schemes;
- the appointment of a competent authority charged with the monitoring the functioning of ADR entities established in its territory;
- qualified ADR entities resolve disputes within 90 days; and
- ADR procedures be free of charge or of moderate costs for consumers.

The Consumer ADR Directive is supported by the Regulation on Online Dispute Resolution (ODR). The Regulation, which provides the mechanisms for resolving consumer disputes online, will come into force by January 2016. The Regulation requires the establishment of an online, interactive portal (the 'ODR Platform') for contractual disputes to be resolved out of court, using techniques such as 'e-negotiation' and 'e-mediation'. Once EU consumers submit their disputes online, they are linked with national ADR providers who will help to resolve the dispute. The Regulation applies to consumer to trader, domestic and cross border disputes, and certain disputes brought against a consumer by a trader. Each member state must propose an ODR contact to assist with disputes submitted through the ODR Platform. Online traders must inform customers of the ADR option and provide a link to the ODR Platform on their website.

Ultimately it is hoped that both of these new measures will increase competition within the EU and give consumers better access to and confidence in alternative methods of dispute resolution.

3.2. The Mediation Directive

Scope of Application

Citing a need to adopt measures for judicial cooperation and proper market functioning in the European Community, the European Parliament and the Council of the European Union issued the 2008 Mediation Directive 2008/52/EC ("the Mediation Directive"). The Directive sought to simplify and provide access to justice by utilizing mediation as a cost-effective and quick judicial resolution mechanism in civil, commercial and cross-border contexts. While expressly stating that it applied only to cross-border disputes, the Mediation Directive also provided in its Recital 8 that "nothing should prevent Member States from applying
Thus, while specifically only addressing cross-border disputes, it is clear that the Directive’s requirements are also applicable, though not required, in addressing internal disputes. The Mediation Directive provided a three-year period of transposition, until May 21, 2011, for Member States to bring legislation into conformity with the Directive.

The Mediation Directive’s definitions establish a broad framework for Member States’ use in drafting legislation to implementation the Directive. With the goal of achieving a balanced relationship between mediation and judicial proceedings, the Directive focuses on quality, sovereignty, enforceability, and confidentiality to achieve its ends. Mediation is defined in Article 3 as, “a structured process however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis to reach an agreement on the settlement of their dispute with the assistance of a mediator.” Article 3 leaves open the possibility for mediation to be voluntarily initiated among the parties, court initiated, or prescribed by Member State legislation. A mediator is deemed to be, “any third person who is asked to conduct a mediation in an effective, impartial and competent way.”

**Structural Requirements in Mediation Regulation**

The Mediation Directive establishes minimum requirements for the best practices mediation regulatory environment discussed above: **Confidentiality**, **Time Limitations**, **Enforceability**, **Quality Control**, and **Public Awareness**.

Article 7 addresses confidentiality as a fundamental requirement for the mediation process to encourage parties to exchange ideas freely in attempting to reach a mutually acceptable resolution. With limited exceptions to confidentiality based on public policy or enforcement concerns, Article 7 provides, “Member States shall ensure that, unless the parties agree otherwise, neither mediator nor those involved in the administration of mediation shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration . . . .” As discussed above, this presumption of immunity from disclosure in future adversarial proceedings is critical to ensure full, effective and meaningful engagement by the parties to a mediation.

Tolling of time limitations is addressed in Article 8, which provides, “Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.” The function of this minimum requirement is to ensure the broad availability of mediation even where concerns about statutes of limitations might otherwise preclude parties from engaging in mediation.

Enforceability of settlement agreements arising from mediations, and the principle of reciprocity, are aspects critical to the functional, community-wide implementation of mediation. Accordingly, in Article 6, “Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable.” This affords parties access to the powerful settlement tool of an enforceable agreement.

Quality Control is addressed somewhat more loosely in the Directive. Rather than a mandatory requirement to establish a system, Article 4 provides that, “Members States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and
organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.” Member States are also “encouraged” to provide training for mediators to ensure the integrity of mediation, i.e. that mediations are “conducted in an effective, impartial and competent way.” Finally, quality, competence, and professionalism are also addressed in Recital 17 of the introduction of the Directive, which provides, “Mediators should be made aware of the existence of the European Code of Conduct of Mediators.”

Public awareness is also addressed. Article 9 provides, “Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.” While the language of “by any means which they consider appropriate” is a significant qualifier, this article sends a clear signal that Member States are expected to promote mediation.

**Mandatory Mediation**

The Mediation Directive also addresses mandatory mediation in its Article 5(2), which expressly allows Member States to mandate mediation: “This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial systems.” In the future, this permission may play a significant role in bringing mediation practice in Member States up to a meaningful level—in other words, a level that achieves the “balance” between mediation and judicial procedures identified in Article 1 as a core objective of the Directive.
4. THE FUNCTIONING OF THE MEDIATION DIRECTIVE IN MEMBER STATES – CASE STUDIES

Member States have by and large successfully transposed the requirements of the Mediation Directive. The following discussion includes a representative cross-section of Member State mediation regulatory environments that provides a picture of how the best practices addressed in the Mediation Directive are actually carried out. Importantly, while the Directive expressly only applies to cross-border disputes, states largely apply the requirements to both internal and cross-border disputes. As such, the Mediation Directive serves a very beneficial role on propagating best practices throughout Member States.

4.1. Greece

Greece implemented the EU directive by enacting Law 3898/2010, which came into force on December 16th, 2010. This law, which bears the title “Mediation in Civil and Commercial Matters” (hereinafter referred to as the “Greek Mediation Law”) has already undergone two reforms and was soon followed by a series of other legislative acts, including Presidential Decree 123/2011 on “the licensing and operation of mediation training providers” and several ministerial decisions regulating particular aspects on mediation.

Although the Directive is limited to cross border mediations and applies to civil and commercial matters—expressly excluding those rights and obligations which are not at the parties’ disposal under the relevant applicable law—Greece applies the Directive to internal disputes on civil and commercial matters.

The Greek Mediation Law establishes quality controls. The standards set by the Greek legal framework to ensure quality in mediation in accordance to the Directive’s requirements refer to (a) regulation of the training and accreditation of mediators (b) adherence to a specific code of conduct and (c) the existence of effective quality control mechanisms concerning the provision of mediation services. Mediators are accredited by the Administration Directorate General of the Greek Ministry of Justice, Transparency and Human Rights. There is a Mediators Code of Conduct that is almost identical to the European Code of Conduct for Mediators.

The Directive’s requirement for enforceability is respected by Article 9 of the Greek Mediation Law, which provides that once the settlement agreement is signed by the mediator, the parties, and their attorneys, the mediator may, upon request of one of the parties—even without the consent of the other—submit it to the court of first instance of the jurisdiction where the mediation took place. It becomes an enforceable title.

To ensure protection of confidentiality, the Greek Mediation Law provides in its Article 10 that mediation should be conducted in a way that should not compromise confidentiality.

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11 This subsection was derived from material generously contributed to the authors by Elena Koltsaki, PhD, an attorney, accredited mediator and mediator trainer in Greece.
12 Government’s Gazette (Fyllo Efimeridos tis Kiverniseos–FEK A 211/16.12.2010)
13 Act of Legislative Content (FEK A 237/5.12.2012) and Law 4254/2014 (FEK 85/7.4.2014)
14 Presidential Decree 123/2011 on “the licensing and operation of mediation training providers”
15 Minimum content of the minutes is also provided by law and requires the name and surname of the mediator, the time and place of the mediation proceedings, the names and surnames of all participating in the mediation proceedings, the agreement to mediate which confirms the parties decision for the mediation to take place and the settlement agreement.
unless the parties agree otherwise. All persons participating in mediation commit
themselves in writing, before attending, to respect the confidentiality of the process and,
should they wish, they may also agree to preserve the confidentiality of the content of any
agreement they might reach during the mediation. The law also provides that mediators,
parties, their attorneys, and anyone attending the mediation proceedings may not be
summoned as witnesses nor may they be compelled to give evidence in any subsequent
legal or arbitration proceedings regarding information resulting from or in connection with
the mediation process (unlike the respective provision of the Directive, where the scope is
limited to civil and commercial proceedings). Nevertheless, exactly as prescribed in the
Directive, the Greek law provides for a few exceptions, namely where necessary for
overriding considerations of public policy. Such considerations are: a) for ensuring the best
interest of children or to prevent the harm to physical or psychological integrity of a
person; and b) where disclosure to the courts of the content of the agreement arising from
mediation is necessary in order to enforce or implement the agreement.

Finally, in line with the Mediation Directive’s provisions on limitation and prescription
periods, Article 11 of the Greek Mediation Law ensures that parties who use mediation as
an alternative way of resolving their dispute are not prevented from initiating court
proceedings by the expiry of limitation or prescription periods during the mediation process.
More particularly, the Greek Mediation Law provides that the initiation of a mediation
process has the effect of suspending the prescription period for the right of action by either
party during the mediation process. The limitation period is resumed once the mediation
attempt has been unsuccessful either by virtue of a unilateral termination served by one
party to the mediator and to the other party or of the minutes signed by the mediator
testifying the termination or by any other way.

4.2. Italy

The Italian Parliament has attempted to regulate mediation for decades. Mediation was first
mentioned in the Italian Civil Code in 1865. In 1931, mediation was used in the context of
public safety provisions. Then in 1940, mediation was added to the Code of Civil Procedure
as an internal procedure conducted by judges in court. Italy later began using mediation in
labour disputes during the 1960s. In 1973, pursuant to Law No. 533, mediation and conciliation
were established in the Code of Civil Procedure. In December 1993, the
chambers of commerce established mediation and arbitration commissions for the purpose
of resolving disputes among companies and between companies and their clients. And in
2003, Legislative Decree 5/2003 initiated mediation for dispute resolution in certain
financial matters and in all corporate matters.

Although mediation had been used in certain sectors until 2003, it was not used by the
general public as a method of alternative dispute resolution. After the adoption of the EU
Mediation Directive, the public became aware of mediation as a result of the Directive’s
implementation. In June 2009, the Italian Parliament issued Law 69, which recognized
mediation as a dispute resolution option for civil and commercial disputes. It also granted
the Italian government the power to issue a legislative decree on mediation, which resulted
in the enactment of Legislative Decree 28 in 2010. Eighteen months later, in October 2012,
Legislative Decree 28 was invalidated on the technical basis that the mediation rules had
been implemented by a government act that had not been passed as a statute by

16 The description of Italy is derived and updated from a larger analysis of Italy law and mediation contained in the
2013 Study, which analysis was based on information from Giuseppe De Palo and Chiara Massidda’s contributions
to The Variegated Landscape of Mediation Regulation, edited by Manon Schonewille and Dr. Fred Schonewille, and
“Lead 5.4 Million Thirsty Horses to Water, and the Vast Majority Will Drink” by Giuseppe De Palo.
Parliament. Parliament remedied this by adopting into law the underlying delegation of authority to the government, with the result that the previous mediation rules came back into effect, with the force of law, on September 20, 2013.

In Italy, mediation is regulated by law, but the mediation procedures are regulated by mediation organizations and service providers. Italy's law regulating mediation applies to both internal and cross-border disputes.

The law sets out the basic best practice requirements for a mediation-enabling regulatory environment. Mediation confidentiality is regulated by Article 9 of Legislative Decree 28. Under it, each individual involved in the mediation process, including parties, counsel and the mediator, has an obligation of confidentiality. This obligation is also applicable to documented statements and information acquired during the proceedings. However, if the parties have consented to the disclosure of information, the mediator is exempt from the obligation of confidentiality. The mediator is also exempt if keeping the information confidential would be in violation of the law. Finally, as regulated by Legislative Decree 28 and Article 200 of the Italian Code of Criminal Procedure, a mediator cannot be required to testify about information obtained during mediation.

The law also provides that mediated settlement agreements are automatically enforceable. When the parties have reached an agreement, it is summarised in the minutes. The minutes are then signed by the mediator, both parties, and counsel for both parties, and then attached to the agreement. According to Article 12 of Legislative Decree 28, each of the parties may file the mediated settlement agreement with the court. It then becomes an executable document with the same legal effect as a court judgment. The reviewing judge checks to ensure that the agreement does not violate public policy or mandatory rules.

Article 5 of Legislative Decree 28 addresses statutes of limitation. When parties mediate their dispute, the mediation proceedings will suspend the applicable statute of limitation for a period of up to four months following the receipt by the mediation service provider of the request to mediate. This limitation suspension only happens once. If mediation fails but the parties start another mediation, the initiation of the subsequent mediation will not suspend the running of the statute of limitations.

Mediator quality control processes are also in place in Italy. The law establishes detailed legal rules governing accreditation and training of mediators and registration of mediation organizations. Mediation organizations that are registered with the Ministry of Justice regulate the certification of mediators. Mediators must be registered with one of the many Ministry-approved mediation organizations. Local bar associations, chambers of commerce, and various professional organizations can establish mediation organizations. Training of mediators can be provided by registered mediation organizations.
4.3. Romania

Romania has a stand-alone law on Mediation. Two years before the adoption of the EU Directive, the Romanian Parliament adopted Law No. 192/2006 on mediation and the organization of the mediator profession, published in the Romanian Official Journal On May 22nd, 2006. The adopted draft was the fifth version of Romanian mediation law since 2000. This law regulated the issues of the place of mediation within the dispute resolution field, and the role and obligations of the mediator. It also clarified how to access mediation services and who can act as a mediator. Finally, the law included several key aspects that were then also required by the Directive regarding quality of mediation services, recourse to mediation, enforceability of mediation agreements, process confidentiality and effects on limitation and prescription periods.

Romania has implemented Article 4 of the Directive through a national accreditation scheme that is based on specific training standards (80 hours). To date, one hundred and twenty-two trainers are authorized to train mediators within twenty-three training providers. The whole system is facilitated by the Romanian Mediation Council, a quality control body that, among other things, sets and enables training standards and a code of ethics and deontology, authorizes mediators, and updates the National Panel of Mediators. This independent panel, which is established in the Romanian Mediation Law, has resulted in almost ten thousand mediators that are authorized to provide mediation services in Romania.

The Directive gives every judge in the EU, at any stage of the procedure, the right to invite the parties to have recourse to mediation if they consider it appropriate in the case in question. The judge can also suggest that the parties attend an information meeting on mediation. The Romanian mediation legislation is built on the principle of free will participation. Parties can voluntarily opt for mediation in order to resolve their disputes. Simultaneously, all judicial bodies have the obligation to inform the disputing parties about the mediation process and its advantages and to recommend them its use.

Law No. 202/2010 adopted by the Romanian Parliament allowed the court to invite the parties to use mediation in order to settle a dispute or to attend an information session on the mediation benefits. In enforcing the provisions of Article 5 of the EU Directive, under Article 2 of Mediation Law in Romania (no. 192/2006), parties with certain types of disputes (consumer, family, malpractice, civil/commercial - under approximately 10.000 Euro) have a duty to attend an information session on the benefits of mediation. Thus, beginning on August 1, 2013, the courts rejected a claim as inadmissible if a claimant had not complied with the duty to participate in an information session on mediation prior to filing the claim, or after the trial filing until the deadline assigned by the court for this purpose. However, the Constitutional Court’s Decision No. 266/25 June 2014, found the provisions of Article 2 (1) and Article 2 (1^2) of the Law No. 192/2006 unconstitutional, disabling this opt-out system of referring cases to mediation.

The Directive, through Article 6, obliges Member States to set up a mechanism by which agreements resulting from mediation can be rendered enforceable if both parties so request. In Romania, the Mediation Agreement becomes enforceable by presenting it to the notarial or judicial authorization (Art. 438-441 of the New Romanian Civil Procedure Code). Moreover, such an authentication of the mediation agreement by a notarial deed or by court approval is directly required in certain situations.

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17 This subsection was developed from material generously contributed to the authors by Adi Gavrila, an attorney, accredited mediator, and mediation center founder in Romania.
The principle of confidentiality stands at the foundation of the Romanian mediation model and it is even acknowledged in the legal definition of mediation. The assurance of confidentiality is fully implemented in the Romanian mediation law and it creates a safe area for the parties and motivates them to participate in the mediation proceedings. The mediator becomes the holder of the secret information jointly shared by the parties and a recipient of any individual communication of a confidential nature from or among them.

Article 2532 point 6 from the Romanian Civil Code codifies the Directive’s requirements about limitations periods. The limitation period will be suspended for the duration of the mediation process if the mediation takes place in the last six months of the limitation period. There is an exception to this rule: point 7 of the same Article applies to the case when the person entitled to act must or could, according to law or contract, try mediation as a pre-trial condition. The limitation period is then suspended during the mediation procedure up to a maximum of three months.

4.4. Spain

Spain has implemented the EU directive by enacting the Real Decreto - Ley 5/2012 (“Law 5/2012”) on internal and cross-border mediation in civil and commercial matters. It became effective on 28 July, 2012. In addition, the Catalonian legislature had already passed act 15/2009, of 22 July 2009, regarding mediation in the sphere of private law. It has been recently further developed by Decree 135/2012, of 23 October 2012, for matters in the Catalonia region. According to sections 6.1 and 6.3 of Law 5/2012, mediation in Spain is always a voluntary process and therefore there is no obligation to participate or reach an agreement.

Law 5/2012 includes an amendment to article 414 of the Civil Procedure Act (LEC), requiring the court to inform the parties of the possibility of resolving their dispute through negotiation, including mediation, and the court may invite the parties to attend an information session. According to section 12.2 of Catalonian Act 15/2009 and Section 29 of Catalonian Decree 135/2012, mediation may also be initiated at the request of the court in any stage of the judicial proceedings or on referral by a justice of the peace, who may propose mediation to the parties and contact the Centre for Mediation in Private Law of Catalonia in order to conduct an information session. The parties may request suspension of the court hearing by agreement (Article 415 LEC as amended by Law 5/2012) in order to proceed to mediation. In the event the mediation ends without a settlement, either of the parties can request cancellation of the suspension and the resumption of the court proceedings.

Confidentiality is also addressed in the law. Article 9.1 of Law 5/2012 provides that the mediation process and the documents used during it are confidential. Mediators are exempt from the obligation to give evidence in civil and commercial judicial proceedings regarding information arising out of or in connection with a mediation procedure (Article 9.2, Law 5/2012). Section 7 of Catalonian Act 15/2009 states that any professional participating in mediation proceedings is obligated to refrain from disclosing information obtained through mediation. However, there are two express exceptions to the duty of confidentiality: written

18 The description of Spain is derived and updated from a larger analysis of Spain’s law and mediation contained in the 2013 Study, which analysis was based on information from Antonio Sanchez Pedreno’s contributions to The Variegated Landscape of Mediation Regulation, edited by Manon Schonewille and Dr. Fred Schonewille.
approval by the parties and a reasoned court order issued by a criminal court (Article 9.2, Law 5/2012).

Mediated settlement agreements are not automatically enforceable. If no judicial proceedings are pending, enforcement of mediation agreements is subject to their conversion into public deeds (Article 23.3, Law 5/2012). If the mediation settlement agreement is reached after the start of a judicial proceeding, under Article 25.4, the parties may request its recognition (“homologacion”) by the court.

For limitations, Article 4 provides that the start of a mediation procedure will suspend the running of any applicable statute of limitations. If the initial minutes establishing the scope of the dispute and other issues are not executed within 15 days from the mediation’s start, the statute of limitations will start running again. Suspension of the relevant statute of limitations will extend until the execution of the mediation settlement agreement, the signing of the Final Minutes, or the termination of the mediation by any of the termination causes established in Law 5/2012.

Finally, for quality controls, according to section 11 of Law 5/2012, three requirements must be fulfilled by individuals in order to be a mediator: first, they must be able to freely exercise their civil rights; second, they must have an official university degree (or equivalent professional studies) and specific training in mediation (Article 2, section 11); and third, they must take out civil liability insurance or an equivalent guarantee. The training should be acquired through one or more courses provided by a duly accredited training institution. According to sections 5 and 6 of Royal Decree 980/2013, mediation training programs must have a minimum duration of 100 hours and they must include both theoretical and practical contents. A Registry of Mediators and Mediation Institutions overseen by the Ministry of Justice has been created and regulated by sections 8-25 of Royal Decree 980/2013. However, registration is voluntary, except for bankruptcy mediators.

4.5. United Kingdom

In the UK, there is no separately standing Mediation Act controlling the procedure or practice of mediation, and there are no current state controls for training, performance, or appointments of mediators. Instead, there are private companies, as well as judicial and government initiatives, to promote mediation and to persuade parties to use mediation. While mediation has existed in the UK for decades as a recognized practice, its formalization in legislation came much more recently. The Civil Procedure Act of 1997, c. 12, introduced the Civil Procedure Rules (CPR), which were intended to enable courts to deal with cases justly, manage cases actively, and require parties to help the courts do so – while encouraging the use of ADR. Since mediation’s introduction into the civil justice system in 1997, the judiciary has encouraged mediation, and reforms to the civil justice system have stimulated the use of mediation. The regulatory environment is growing, but as in many Member States, mediation is still used relatively infrequently.

The Directive has been implemented differently in the three UK jurisdictions (England and Wales, Scotland, and Northern Ireland). In England and Wales, it was implemented only for civil and commercial cross-border disputes. It was implemented through two statutory

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19 This sub-section was derived from Andrew Hildebrand’s contribution to EU Mediation Law and Practice, edited by Professors Giuseppe De Palo and Mary B. Trevor.
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Instruments: the Cross-Border Mediation (EU Directive) Regulations (‘the Cross-Border Regulations’) and the Civil Procedure (Amendment) Rules (‘the Civil Procedure Amendment Rules’). In both Scotland and Northern Ireland, it was implemented only in relation to cross-border mediation (as opposed to internal domestic mediation).

Enforcement of mediated settlement agreements is addressed effectively. Following the implementation into UK law of the Directive, an agreement reached in a cross-border mediation (as defined by the Directive) may be enforced by way of an application to a court under the CPR. Where a dispute is cross-border, and there are no existing proceedings, a court application can now be made under rule 78.24 of the CPR for a new type of order, called a mediation settlement enforcement order (MSEO). The settlement agreement is attached to the MSEO and the court will require evidence that each party has given its explicit consent to the application being sought.

In response to Article 4 of the Directive regarding either voluntary codes of conduct by mediators and mediation provider organizations or additional training requirements, no additional legislation has been introduced in England and Wales, either for civil cross-border or domestic mediation. However, the Civil Mediation Council (CMC) is planning on introducing a mediator registration scheme that will also cover individual mediators and mediation training.

In England and Wales, confidentiality is key to the concept of mediation, and courts have generally been unwilling to pierce the mediation veil of confidentiality. Regulations 9 and 10 of the Cross-Border Regulations broadly echo Article 7 of the Directive. Regulation 9 states that a mediator has a right to withhold mediation evidence in civil cross-border proceedings (and in arbitration) and makes that right subject to regulation. Regulation 10(b) states that the test as to whether a mediator can be ordered to disclose mediation evidence is whether ‘the giving or disclosure of the mediation evidence is necessary for overriding reasons of public policy’. This gives mediators in civil and commercial cross-border disputes greater protection than the ‘interests of justice’ test that applies in purely domestic disputes.

In general, it is not only the mediation itself that is confidential, but also the sessions between the mediator and each party. Mediations in the UK are conducted on a “without prejudice” basis, meaning that submissions made in an attempt to reach settlement will not usually be admissible in later court proceedings relating to the same subject matter, subject to some limited exceptions (such as agreement of all the parties or a legal obligation to disclose the information). Any express confidentiality provisions in essence reinforce the “without prejudice” nature of the mediation.

While there are no official statistics for the number of mediations that take place in England and Wales, or that record their success rates in settling disputes, there have been various informal studies. Most recently, according to a 2014 Mediation Audit conducted by Centre for Effect Dispute Resolution (CEDR), 9,500 commercial and civil cases are now mediated annually, an increase of 1,500 cases, or 9%, in the past two years. The collective value of the cases mediated each year is around £9 billion. Of these cases, 86% settled, either on the day (over 75%) or shortly thereafter. CEDR also estimates that “by achieving earlier resolution of cases that would otherwise have proceeded through litigation, the commercial mediation profession ... save(s) the British Economy around £2.4 billion a year in wasted management time, damaged relationships, lost productivity and legal fees”.

Mediation in the UK is the choice of the parties as a voluntary process. Subject to any pre-existing contractual arrangement between parties to mediate a dispute, there is no
obligation on litigants to mediate commercial disputes. However, courts are increasingly encouraging mediation and legal representatives are required to confirm that they have explained the various ADR options to their clients. A court may, on its own initiative, stay a hearing to allow a party to participate in mediation. Additionally, a court can impose costs sanctions where it decides that a party has unreasonably refused to engage in ADR.
5. RESULTS OF THE DIRECTIVE’S IMPLEMENTATION AND POSSIBLE PROBLEM AREAS TO ADDRESS

While the Mediation Directive now provides a strong “best practices” guide for unifying mediation systems across Member States, the number of mediations actually occurring varies significantly among the states. Overall, however, the numbers of mediations are very low, representing just a tiny fraction of the total number of cases in the judicial systems of the Member States. The current low number of mediations is referred to as the EU Mediation Paradox.

This paradox suggests a development question and opportunity: How can access to justice be further enhanced in determining the next steps for EU legislation on Mediation in Member States?

5.1. The EU Mediation Paradox

As is seen from the case studies above, adoption of the Mediation Directive in 2008 provided a great deal of guidance and standardization about mediation in the EU. As is good practice, in 2011 (shortly after the Directive’s requirements went into effect), the European Parliament began examining the mediation environment within the EU.

By that time, a great range of regulatory responses could be observed among Member States, with some expressly opting to apply the Directive only to cross border disputes. But many others sought, to varying degrees, to apply it to domestic disputes as well. Nevertheless, as two key studies show, while the functional requirements of the Mediation Directive have been largely transposed within Member States, the actual numbers of cases being mediated have been disappointingly low.

The 2011 Cost Study

The European Parliament adopted a Resolution in 2011, noting that the Mediation Directive appeared to have produced only “modest” results. At that time, even the countries experiencing the largest impact hovered in the mere hundreds of mediations per annum, instead of the tens of thousands, or hundreds of thousands, needed to achieve “the balanced relationship between mediation and judicial proceedings” sought by the Mediation Directive. With millions of cases still entering Member State judicial systems each year, the number of mediations would have to grow by several orders of magnitude to achieve that balance.

The European Parliament first sought to understand the problem by quantifying it. In the fall of 2011 it commissioned a study to examine the potential impact of mediation use by determining the cost of commercial litigation and projecting from that the range of economic cost for not using mediation.

The study, Quantifying the Cost of Not Using Mediation – a Data Analysis, (the 2011 Study) examined time and cost figures for certain types of litigation across the EU and sought to determine what would happen if mediation were integrated as a step in the litigation process. Specifically, the 2011 Study posited various scenarios of possible early settlement due to mediation and found very low “break-even” points for settlement rates, beyond which time and costs would increasingly be saved. EU-wide, the break-even point for time savings was found to be 19%, while the break-even point for cost savings was 24%. These findings were profound, showing that even with very low mediation success rates,
mediation could produce significant time and cost savings if integrated into the litigation process.

The obvious lost economic opportunities brought to the fore the EU Mediation Paradox – if increasing the use of mediation brings such significant time and cost savings to the parties (and to the judiciary), why were Member States experiencing such low rates of mediation? Seemingly, the parties and Member States were acting irrationally, all other things being equal. But in actuality, other things are not equal. There are many, perhaps countless, factors impacting how mediation is used—key among them being regulatory environment rules, incentive rules, concerns about quality of service and professionalism, and levels of awareness among parties.

The 2011 discussions began a broader-based examination of why the Mediation Directive had not produced a significant increase in mediation use. More than a year later, during a formal hearing in December 2012, the Legal Affairs Committee of the European Parliament asked the European Commission whether legal action needed to be taken against the Member States for their de facto failure in implementing the Directive. Three and half years after its issuance—and one and a half years after the deadline for its implementation—mediation was still being used far less often than one case out of a thousand.

Raising the question established a principal focal point for the discussion—whether Member States should be held responsible for the absence of a “balanced relationship between the number of mediations and judicial proceedings” sought by the Mediation Directive. Based on this balanced relationship goal, a Balanced Relationship Target Number (BRTN) theory had been introduced in a compendium examining Member States’ mediation systems that had been published earlier in the year. The BRTN theory suggested that, under the Mediation Directive, Member States could each set a target minimum percentage of judicial cases that would need to be mediated for there to be a balance between mediation and judicial proceedings. In other words, the BRTN theory asked whether Member States should each establish performance indicators for their respective mediation systems.

The immediate response was that because only one year had passed since the Directive’s implementation deadline, it would be too soon to pass judgment as to the Directive’s effectiveness in implementation. But it was clear that the apparent lack of impact was a matter of concern.

The 2013 Rebooting Study

Following up on this line of concern, in 2013 the European Parliament commissioned a study to examine the status of mediation in Member States and establish the root causes of low levels of mediation. This study – “Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU,” (the Rebooting Study) involved conducting a survey of over one thousand professionals in the EU to: 1) estimate numbers, cost, and time of mediations (as there are no uniformly collected data on these across all Member States); and 2) seek opinions about regulatory and non-regulatory methods to increase mediation.

The first key finding of the Rebooting Study was to reconfirm the findings of the 2011 Study that even a very modest mediation success rate of 30% settled cases to total cases mediated would save significant time and money for parties. If accurate, this would mean that, effectively, billions of Euros were being needlessly spent in litigation. The other key

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finding, based on a review of estimated numbers of mediations, showed that a large number of states were still experiencing 2000 or fewer mediations per year – again, a very small percentage of total eligible judicial cases. Only five Member States stood out: Germany, Italy, the United Kingdom, and The Netherlands, with over 10,000 estimated cases per annum, and Italy, with more than 200,000 cases per annum. The Italy experience, discussed below, depicts in sharp relief methods of raising the number of mediated cases.

The Rebooting Study survey’s questions regarding regulatory and non-regulatory methods of increasing numbers of mediated cases generated very interesting results. First, it appeared that improved regulatory features for mediation, such as confidentiality of proceedings, effective enforceability of agreements, and accreditation of mediators did not appear to be significant or decisive factors enhancing the use of mediation. Instead, by far the single most effective regulatory feature associated with significant increase in mediations was the introduction of “mandatory mediation elements” in Member State legal systems. In other words, while mediation is a voluntary process, the most effective way to increase the number of cases mediated in Member States would be to incorporate some requirements for parties either to attempt mediation or to learn more about it.

**The opportunity for Integrated Mediation as a solution**

Considered together, the two studies establish that: 1) very significant amounts of resources (time and money) could be saved if mediation were to increase substantially; and 2) including mandatory elements to bring parties to mediation as part of the litigation process could cause the number of cases mediated to substantially increase. Accordingly, these two studies support continued consideration of what further regulatory support can be provided at the EU level to increase the use of mediation and, correspondingly, access to justice within Member States.

The scope of potential economic savings is tremendous, as the number of judicial cases is impressively large. The European Commission for the Efficiency of Justice (CEPEJ) reports on the numbers of cases each year. The data reported in the following table are part of a comprehensive study conducted by CEPEJ, which ended in 2013 and was based on 2012 data collected from 48 countries. At first sight, the number of incoming and pending cases appears very high, but unfortunately the reality is even worse: those numbers show only the situation of processes in civil and commercial matters and they cannot be exhaustive (no information on pending cases available from 3 countries). The landscape might be even darker, because in countries such as Italy, which already have an enormous number of pending cases, another court, (in Italy, the "Giudice di Pace"), is in charge of small claims (more than 1 million according to the Italian Ministry of Justice report of 2011). Those situations are not taken into account in the CEPEJ study.
### Figure 2: Table of Numbers of Judicial Cases in the EU

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>POPULATION</th>
<th>PENDING CASES</th>
<th>INCOMING CASES</th>
<th>TOTAL CASES</th>
<th>CASES/POPULATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>8,451,860</td>
<td>45,414</td>
<td>136,767</td>
<td>182,181</td>
<td>0.021</td>
</tr>
<tr>
<td>Belgium</td>
<td>11,161,642</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>7,284,552</td>
<td>100,225*</td>
<td>477,315*</td>
<td>577,540*</td>
<td>0.79</td>
</tr>
<tr>
<td>Croatia</td>
<td>4,262,140</td>
<td>304,121</td>
<td>275,739</td>
<td>579,860</td>
<td>0.13</td>
</tr>
<tr>
<td>Cyprus</td>
<td>865,900</td>
<td>41,863</td>
<td>35,289</td>
<td>77,152</td>
<td>0.089</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>10,509,286</td>
<td>190,855</td>
<td>456,382</td>
<td>647,237</td>
<td>0.061</td>
</tr>
<tr>
<td>Denmark</td>
<td>5,602,628</td>
<td>26,290</td>
<td>54,342</td>
<td>80,632</td>
<td>0.014</td>
</tr>
<tr>
<td>Estonia</td>
<td>1,286,479</td>
<td>8,965</td>
<td>18,344</td>
<td>27,309</td>
<td>0.021</td>
</tr>
<tr>
<td>Finland</td>
<td>5,426,674</td>
<td>11,538</td>
<td>14,011</td>
<td>25,549</td>
<td>0.004</td>
</tr>
<tr>
<td>France</td>
<td>65,585,857</td>
<td>1,677,085</td>
<td>1,917,066</td>
<td>3,594,151</td>
<td>0.054</td>
</tr>
<tr>
<td>Germany</td>
<td>80,233,100</td>
<td>795,969</td>
<td>1,576,577</td>
<td>2,372,546</td>
<td>0.029</td>
</tr>
<tr>
<td>Greece</td>
<td>11,062,508</td>
<td>525,039</td>
<td>672,411</td>
<td>1,197,450</td>
<td>0.1</td>
</tr>
<tr>
<td>Hungary</td>
<td>9,908,798</td>
<td>129,673</td>
<td>458,465</td>
<td>588,138</td>
<td>0.059</td>
</tr>
<tr>
<td>Ireland</td>
<td>4,591,087</td>
<td>NA</td>
<td>180,892</td>
<td>NA</td>
<td>NA</td>
</tr>
<tr>
<td>Italy</td>
<td>59,685,227</td>
<td>3,929,361</td>
<td>1,745,510</td>
<td>5,674,871</td>
<td>0.095</td>
</tr>
<tr>
<td>Latvia</td>
<td>2,044,813</td>
<td>31,368</td>
<td>42,337</td>
<td>73,705</td>
<td>0.036</td>
</tr>
<tr>
<td>Lithuania</td>
<td>3,003,641</td>
<td>32,105</td>
<td>122,869</td>
<td>154,974</td>
<td>0.051</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>525,000</td>
<td>3,471</td>
<td>5,987</td>
<td>9,458</td>
<td>0.018</td>
</tr>
<tr>
<td>Malta</td>
<td>421,364</td>
<td>10,464</td>
<td>5,151</td>
<td>10,615</td>
<td>0.037</td>
</tr>
<tr>
<td>Netherlands</td>
<td>16,778,025</td>
<td>312,830*</td>
<td>1,286,702*</td>
<td>1,599,532*</td>
<td>0.095</td>
</tr>
<tr>
<td>Poland</td>
<td>38,533,000</td>
<td>528,772</td>
<td>1,195,921</td>
<td>1,724,693</td>
<td>0.044</td>
</tr>
<tr>
<td>Portugal</td>
<td>10,487,289</td>
<td>364,305</td>
<td>369,178</td>
<td>733,483</td>
<td>0.069</td>
</tr>
<tr>
<td>Romania</td>
<td>21,305,097</td>
<td>676,972</td>
<td>1,294,604</td>
<td>1,971,576</td>
<td>0.092</td>
</tr>
<tr>
<td>Slovakia</td>
<td>5,410,836</td>
<td>181,517</td>
<td>222,005</td>
<td>403,522</td>
<td>0.074</td>
</tr>
<tr>
<td>Slovenia</td>
<td>2,058,821</td>
<td>47,924</td>
<td>47,810</td>
<td>95,734</td>
<td>0.046</td>
</tr>
<tr>
<td>Spain</td>
<td>46,006,414</td>
<td>1,366,476</td>
<td>1,927,185</td>
<td>3,293,661</td>
<td>0.071</td>
</tr>
<tr>
<td>Sweden</td>
<td>9,555,893</td>
<td>32,793</td>
<td>68,579</td>
<td>101,372</td>
<td>0.01</td>
</tr>
<tr>
<td>U.K.</td>
<td>61,881,400</td>
<td>NA</td>
<td>339,174</td>
<td>NA</td>
<td>NA</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>TOT. POPULATION</th>
<th>TOT. CASES</th>
<th>P. CASES</th>
<th>TOT. CASES</th>
<th>I. CASES</th>
<th>TOT. CASES</th>
<th>AVERAGE C./P.</th>
</tr>
</thead>
<tbody>
<tr>
<td>509,929,331</td>
<td>11,375,395</td>
<td>15,739,374</td>
<td>27,114,769</td>
<td>0.053</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(* All non-criminal cases)  
With these numbers, the cases, the potential for cost and time saving opportunities for mediation are very substantial—in the range of tens of billions of Euros—even with only modest settlement rates. According to the findings of the Rebooting Study, the most effective way to increase mediations would be for mandatory elements to be applied.

Within the modern view of access to justice, such “mandatory elements” could consist of integrating a mediation step in certain judicial procedures, which the parties can easily opt-out of by paying a small fee to the mediator. The authors of this In-Depth Analysis refer to this as “Integrated Mediation”. In Integrated Mediation, judicial processes would incorporate into the judicial process an initial meeting with a mediator, which the parties could then “opt-out” of at the time of the meeting. The parties would have the opportunity to mediate, but would not be forced to do so. This approach of integrating a mediation step into the judicial process in appropriate types of cases may help achieve the potential savings that the 2011 Study and the 2013 Rebooting Study indicate are possible.

The following section looks at how mandatory elements in Mediation, such as integrated mediation, have been applied in the EU so far.

**5.2. Experience in the EU with Mandatory Elements in Mediation**

There is a growing trend toward mandatory elements in mediation in the EU. For example, Italy, as described above in its case study, has a mediation step integrated into the court process for certain civil and commercial disputes.

The UK includes a Mediation Information Assessment Meeting (MIAM) for certain disputes. Representing a step towards introducing integrated mediation in the UK, all potential applicants in relevant family court proceedings are now required to attend a MIAM to consider dispute resolution options. Courts are required to know that non-court dispute resolution has been considered before parties can proceed with an application and a court has the ability to adjourn proceedings if it considers that mediation is more appropriate. Use of the MIAM may even be expanding beyond family matters in the UK. At the CMC 2014 Conference, the Minister of Justice, Lord Faulks, stated, “the Ministry of Justice is also willing to reconsider compulsory mediation information and assessment meetings – or MIAMs – in civil claims.”

Also, the Greek Mediation Law includes a reference in to the possibility of a mediation being initiated through an obligation provided by law. As yet there are no provisions in the Greek law providing for mandatory mediation, although there have apparently been discussions about drafting changes to Greece’s Mediation Law to create mandatory mediation. There are reports that a working group has been formed for the purpose of applying “mandatory mediation” for certain categories of disputes, and that a draft has been submitted to the Ministry of Justice in January 2015, followed by a promising press release.

Finally, EU-level instruments are starting to impose mandatory ADR at the sector level, as is the case with the Universal Services Directive (discussed below in relation to the Alassini decision by the ECJ).

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21 The MIAM in certain types of family disputes is now a statutory requirement codified in the Child and Families Act 2014, s 10.
**Italy’s Experience with Integrated Mediation – On/Off Switch**

Italy presents a special case demonstrating the very significant, and positive, impact of Integrated Mediation. As reported in the Rebooting Study, Italy went from reporting a **de minimis** number of cases to reporting more than 200,000 per annum. This presents a very sharp contrast with the numbers in other Member States.

That difference in numbers is almost certainly due to Italy’s mediation regulatory environment. As stated above, in 2011, Italy put in place an integrated mediation step for initiating certain civil and commercial cases. Before litigating in court, parties must meet with a mediator, at which meeting one or both of the parties may opt-out of mediation, with each party then paying the mediator a modest fee for the mediator’s time. The requirement was established through the government-issued Legislative Decree 28 of 2010, which went into effect on March 21, 2011. The number of mediations immediately jumped from likely a few hundred cases per year to over 200,000 cases per year.

In addition to increasing mediations by several orders of magnitude, however, the requirement also triggered strong opposition by lawyer organizations. As mentioned above in the case study for Italy, Legislative Decree 28 was suspended. This was due to a legal challenge that resulted in a Constitutional Court decision in October 2012 invalidating Legislative Decree 28 on the technical basis that the mediation rules had been implemented by a government act that had not been passed as a statute by Parliament. Immediately following the Court decision, virtually all mediations came to a halt in Italy, even those that had been voluntarily initiated. The Italian Parliament responded to this decision as quickly as it could by adopting into law the underlying delegation of authority to the government, with the result that the previous mediation rules came back into effect, with the force of law, on September 20, 2013. The number of mediations in Italy immediately jumped back up to tens of thousands of cases per month.

In effect, the Italian experience provides both a factual and a counterfactual example for the proposition that an Integrated Mediation mechanism—one where mediation is integrated into the litigation process (with the opportunity to opt-out simply and easily)—will likely very significantly increase the number of mediations in a Member State. While not dispositive on the issue of whether Integrated Mediation should be imposed, or otherwise serve as a policy option for the EU, it demonstrates that Integrated Mediation can have a strong effect on establishing a balance between mediation and judicial proceedings.

**Romania’s Experience with Mandatory Mediation Information Sessions**

Despite the positive experience in Italy, obligatory elements regarding mediation may be controversial in some Member States. The experience in Romania suggests that such may be the case with a more conservative, historical approach toward access to justice that focuses on access to courts. Until recently, Romania’s Law on Mediation had rules in effect that required parties to attend a mediation information meeting prior to initiating certain kinds of civil cases. The law also contained a provision expressly requiring the court to dismiss a case when the parties have not attended a mediation information meeting.

In holding both of these provisions to violate Romania’s Constitution, the Romanian Constitutional Court in Decision No. 266 of May 7, 2014, stated: "**M**andatory participation in learning about the advantages of mediation is a limited access to justice because it is a filter for the exercise of this constitutional right, and through the application of legal proceedings’ inadmissibility, this right is not just restricted, but even prohibited." The court supported this ruling by reasoning that the procedure, "**a**ppears undoubtedly as a violation
of the right of access to justice, which puts undue burden on litigants, especially since the procedure is limited to a duty to inform, and not an actual attempt to resolve the conflict through mediation, so the parties briefing before the mediator has a formal character.”

Thus, the Romanian Constitutional Court relied on a finding that the information meeting was a “filter” against the exercise of the constitutional right of access to justice. However, the court was careful to distinguish this from a requirement to actually attempt to resolve the conflict through mediation. So it is not certain how that court would have ruled on an Integrated Mediation process; such a process was neither contained in the Romanian Mediation Law nor before the Court. It is important to note, however, that one of two of the statutory provisions thrown out was one that mandated dismissal of a case, which can have extreme consequences for litigants who were not properly advised. A less draconian penalty might simply be for the court to defer a hearing on the case until the mediation step has been attempted and one or both of the parties have opted out.

**EU-Level Experience – The Alassini Case**

In a case that demonstrates the modern, liberal view of access to justice, the European Court of Justice examined mandatory out-of-court settlement requirements transposed under force of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002—the Universal Service Directive. Specifically, in the Alassini case the ECJ addressed providers’ claims that a suit brought against them could not proceed because of requirements in national legislation (Italy’s Electronic Communications Code then in force) that mandated an attempt at out-of-cour settlement before commencing a case.

In finding that the Member State law’s requirement violated neither the principle of equivalence and effectiveness nor the principal of effective judicial protection, the ECJ laid down a bright line—or safe harbour—for mandatory out-of-court settlement systems. Mandatory systems must:

- Not result in a decision binding on the parties
- Not cause a substantial delay
- Suspend the period for time barring of claims
- Not give rise to cost, or are low cost

The ECJ provided a strong rationale for mandatory mediation:

> [T]he imposition of an out-of-court settlement procedure such as that provided for under the national legislation at issue, does not seem – in the light of the detailed rules for the operation of that procedure, referred to in paragraphs 54 to 57 of this judgment – disproportionate in relation to the objectives pursued. In the first place, as the Advocate General stated in point 47 of her Opinion, no less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient a means of achieving those objectives. In the second place, it is not evident that any disadvantages caused by the mandatory nature of the out-of-court settlement procedure are disproportionate to those objectives.

By analogy, at least at the EU level, the Alassini ruling provides clear guidance for mandatory elements in mediation requirements, suggesting that Integrated Mediation mechanisms may be established so long as they observe the above four limitations. \(^{23}\)

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\(^{22}\) Judgment of the Court (Fourth Chamber) of 18 March 2010, Rosalba Alassini v Telecom Italia SpA (C-317/08), Filomena Califano v Wind SpA (C-318/08), Lucia Anna Giorgia Iacono v Telecom Italia SpA (C-319/08) and Multiservice Srl v Telecom Italia SpA (C-320/08)

\(^{23}\) It is important to note that the European legislator is aware of the significance of moving away from the model of total voluntariness in mediation at the sectoral level. In this respect, there are two prominent additional examples to consider. First, the pending proposal to review the Insurance Mediation Directive, dated 2012, proposed to rewrite current article 13 to include a requirement that “ensure that all insurance undertakings and
6. THE WAY FORWARD

This In-Depth Analysis of the functioning of the mediation regulatory environment in the EU has identified clear, successful functioning on the Mediation Directive’s specific structural requirements for mediation regulatory systems among Member States. But its principal objective, identified in Article 1—building a balanced relationship between mediation and judicial procedures—seems much more difficult to achieve. The passage of almost seven years from the adoption of the Mediation Directive, and almost four years since its transposition date, may now provide an opportunity for review and decision making, particularly as the Mediation Directive may be reconsidered in 2016. It may be time to begin planning the next steps, including updating or upgrading the Mediation Directive. As such, this In-Depth Analysis expects to generate discussion that may lead to well-informed recommendations for the next generation of mediation development in the EU context. It concludes by suggesting some options for consideration and discussion and by advising of a new survey to gather data on mediation possible further developments.

6.1. Options for Consideration

6.1.1. Option 1 – A Balanced Relationship Target Number Requirement

Assuming that the regulatory objectives in Article 1 of the Mediation Directive remains to build a “balanced relationship between mediation and judicial procedures,” the two studies – the 2011 Study and the Rebooting Study – appear to suggest that this relationship may be achieved through multiple means. One possibility is through establishment of a specific Balanced Relationship Target Number (BRTN) requirement. Essentially the BRTN would work as a mechanism requiring each Member State to develop a target percentage or number of cases with respect to the total number of civil and commercial cases and report annually on their performance—a sort of key performance indicator (KPI). There would be data collection matters that need to be resolved – source, frequency of collection, quality – that would likely differ for each state. However, some amount of data on court cases does

insurance intermediaries participate in the procedures for the out-of-court settlement of disputes” where certain conditions are observed.

Clearly, this proposal recognized that in order for there being effective out-of-court settlement of insurance disputes, it is important to oblige one of the parties, namely the party with likely more bargaining power, to participate to the alternative dispute resolution proceeding. This proposal is still pending and, as it will be argued, should be re-written, based on the foregoing analysis of the opt out models.

Another example of proposed EU legislation requiring at least one of the parties to participate in the mediation process comes from consideration for EU regulation of Packaged Retail Investment Products, or PRIPs. In this context, a compromise proposal very similar to the one just described would have obligated, “insurance, investment product manufacturers and the persons selling investment products . . . . to participate in . . . [ADR] procedures initiated by retailed investors concerning the rights and obligations established by this Regulation, subject to certain safeguards in conformity with the principle of effective judicial protection.”

Presumably because of the resistance by the banking and financial industry, this proposal was at the end struck down, so that the current version of it reads as follows: “(28a) Member States should ensure that consumers have access to effective and efficient alternative dispute resolution procedures for the settlement of disputes concerning rights and obligations established under this Directive. Such alternative dispute resolution procedures and the entities offering them shall comply with the quality requirements laid down in Directive 2013/11/EU. [the Consumer ADR Directive]”

Clearly, the new version would be far less effective than the previous one, at least if we accept the rationale of the European Court of Justice in the Alassini case.

These two examples are very powerful because they prove that if one wants to move into the direction of inserting mandatory elements in mediation, this should be done with great care. Possibly, if the old version of PRIP had been written in a way to allow an easy opt out, the final version would not have looked like the current one, which is clearly very vague. This also suggests that the legislator should review the current version of the insurance mediation directive, article 13, so that it does not get watered down again, just as it happened in the case of PRIP.

If the legislator comes up with the standard, effective formula based on the opt out models, that formula could be inserted in other pieces of sector specific legislation, such as in the case of banking and insurance matters.

24 The BRTN mechanism, as a potential option, was proposed and described in some detail by several of the authors of this In-Depth Analysis in EU Mediation Law and Practice, (G. De Palo and M. Trevor, 2012), Oxford Press, at 8-10.
exist, for example, though the World Bank’s annual Doing Business Report, or through data compiled by the European Commission for the Efficiency of Justice created within the Council of Europe. More standardized collection of data on actual mediations would need to be developed as well. A BRTN requirement would provide Member States with latitude and flexibility in establishing targets that make sense within their respective systems, and yet also provide a mechanism for tracking performance over time. That level of awareness alone at the Member State level could provide incentive to improve performance year on year.

This option has the benefit that it would be more permissive, in the sense that it allows Member States to determine on their own how they want to implement it, and how they want to achieve target numbers. It would result in comprehensible and quantifiable performance information. It has drawbacks, in addition to lack of standard data, in that it does not offer much guidance in setting targets, allowing Member States to potentially set "low-bar" expectations.

6.1.2. Option 2 – Mandatory Elements in Mediation (Integrated Mediation)

Another, more direct, mechanism that could be implemented is for the Mediation Directive to require Member States to create mandatory elements in mediation in certain kinds of judicial procedures, like those based on civil and commercial disputes. Where such procedures integrating a mediation step into the judicial procedure—Integrated Mediation—exist, as in Italy, it is already well established that the number of mediations grows tremendously, by several orders of magnitude.

This option has the benefit of directly addressing a desired outcome of the Mediation Directive, and it is likely to be highly effective in doing so. It has drawbacks as well in that there is not complete unanimity in the legal and professional communities that such forms of Integrated Mediation should be imposed on Member States. The Romania Constitutional Court case cited above exemplifies that there may be doubt, although that case dealt with an imposed Mandatory Information Meeting (an Opt-In, rather than an Opt-out, mechanism). Moreover, it would require specific amendment of the Mediation Directive, which currently allows, but expressly does not require, mandatory mediation and applies directly only to cross-border disputes. In any event, given the strength of the observed experience so far, it is an option that should be ripe for discussion.

6.1.3. Option 3 – Do Nothing

It is always possible, as well, to take no action on the Mediation Directive. The Directive can be said to have had a very good salutary effect in providing guidance on best regulatory practice for mediation systems. As in 2011 and 2013, it may be feasible to continue waiting. Deferring a decision on changing the Mediation Directive minimizes risk of substantial, complex debate. However, in light of the persistent low numbers of actual mediation cases and previous deferrals, over time the call to do something will likely continue to increase.
6.2. New Survey of Professionals

At this In-Depth Analysis is being written, the authors are conducting an online survey EU-wide among a variety of professionals to follow up on the critical points raised in the Rebooting Study and discussed, to some extent, here. Opened on January 19 following adjustments made after review and comment by more than 20 senior experts around the world, this survey – the 2015 EU Mediation Impact Survey – requests several types of data in three basic sections:

- **The Estimation Section** – Requests estimates of numbers of mediations and the time and costs of mediation of a moderate-sized case (derived using per capita income data reported by the World Bank);
- **The Opinion Section** – Requests opinions on the potential effect of Integrated Mediation in the respondents’ respective Member States, what groups might be expected to support it, and whether other mechanisms might have greater impact on the number of mediations;
- **The Business and Experience Section** – Requests information about the respondents’ principal profession and degree of experience in mediation.

The goals of this survey will be to refine and update findings from the Rebooting Study, and to present sound data for recommendations regarding policy options for improving Mediation in the EU and, potentially, for updating or upgrading the Mediation Directive. The **Estimation section** will allow the Study-in-Progress to reconfirm or update the 2013 Rebooting Study’s findings regarding the lost economic opportunities of Member States with low levels of mediation. The **Opinion section** responses will allow an assessment of whether the Mediation Directive is being followed effectively by Member States and an analysis of whether other policy options exist regarding Integrated Mediation. The **Business and Experience section** will allow for control analysis to check for bias in the results and verify the level of professionalism and experience.

Because the survey is currently in process, this In-Depth Analysis cannot draw any firm conclusions, but the interim data from more than 300 responses, so far, should be of interest to policy makers. The interim data suggest answers to two key queries, outlined below:

"Does a balanced relationship exist?"

The survey asks participants directly whether they think that a "'balanced relationship’ currently exists between mediation and the judiciary in terms of the total number of disputes mediated, compared to the number of disputes litigated, annually." Although the survey remains open as of this writing, over 88% of respondents so far have indicated either "No, it probably does not exist" or "No, I strongly believe it does not exist." This interim result suggests an opinion among professionals that the Mediation Directive’s goal of a balanced relationship between mediation and the judicial process does not exist in the respondents’ respective Member States. This is preliminary, raw data and it will need to be fully analysed. However, if this opinion and its apparent strength remain after the closing of the survey, it will present a strong case for examining policy updates or upgrade options.

"Would Integrated Mediation increase the number of mediations?"

Another interim observation concerns respondents’ opinions regarding Integrated Mediation, which the survey will help focus on and evaluate. In the survey, Integrated Mediation is explained as a process that must take place before initiating a judicial
Cross-border activities in the EU - Making life easier for citizens

procedure. In this process, the parties must attend a mediation session and may opt-out during the meeting with no negative consequences (other than the sides each paying the mediator a modest sitting fee to compensate for his or her time). The survey distinguishes this “opt-out” mediation mechanism from those where, in several Member States, parties must attend a “mediation information session” and, based on that meeting, decide if they want to “opt-in” to mediation. The survey asks respondents whether such an “integrated mediation” mechanism in their own country would likely increase the number of mediations.

As applied to Integrated Mediation, the survey seeks to isolate and measure responses to an opt-out mechanism. Although the survey is still in process, interim results indicate an overwhelming majority (currently 77%) of responding professionals indicating their expectation that the number of mediations is “likely” or “very likely” to increase if an Integrated Mediation (opt-out) mechanism is put in place in their Member State. As with the balanced relationship data, this is preliminary data and is subject to additional data coming in and analysis of that data.

As of the date of the submission of this In-Depth Analysis the survey is ongoing, and more than three hundred responses have been received from various professionals, lawyers, judges, mediators, and civil servants from all over the EU. The early indications are, as outlined above, that the next step of development for mediation in the EU will need to effectively increase the reliance on mediation, and that Integrated Mediation is believed to be a very effective tool for this.
7. CONCLUSION

ADR is used world-wide in various forms, and serves as an integral part of the modern concept of access to justice. Disputants increasingly rely on ADR to escape the time, cost, and risk of litigating in court, and as well to have complex disputes addressed by professionals in a particular sector. Its continued growth is not surprising.

The most frequently used types of ADR now are those based on mediation, where the neutral is not expected to make a decision, but rather is engaged to help the parties communicate and come to an agreement. The mediator has several tools to help break down barriers and identify key concerns that may not be obvious to either party, and there are a large number of types of mediation, each tailored to the specifics of the dispute between the parties. Being a mediator is increasingly becoming a popular profession, both for lawyers and non-lawyers, who want to offer their skills at bringing disputing sides together. Mediation service providers are becoming more numerous as public awareness of mediation as a cost and time saving alternative grows.

The European Union, and its Member States, have done a lot of work both to promote mediation as a viable form of access to justice and to create an appropriate mediation-enabling regulatory environment. The discourse on mediation will, and should, continue, as there are still many things to do to bring mediation to the fore and increase awareness and reliance on mediation.

While there has been significant progress in creating a functional environment for mediation, particularly through the Mediation Directive, the outcome sought by the Mediation Directive—establishing a balance between mediations and judicial procedures in Member States—remains elusive. Member States by and large have appropriate regulatory structures in place as required by the Mediation Directive, but the numbers of mediations that actually occur remain a tiny fraction of the enormous caseload faced by Member State judiciaries and cannot realistically be viewed as having attained a balanced relationship with judicial procedures. Something else clearly needs to be done.

The Rebooting Study demonstrates that the single most effective way to increase the number of mediations that take place, thereby reducing the burden on courts and providing relieve to disputing parties, is for mandatory elements to be in place for mediation in appropriate cases. The Italian case study shows definitively the effect of putting Integrated Mediation into place, stopping it for a period, and then restarting it. The Alassini case establishes clear guidelines for mandatory ADR at the EU level. And finally, the interim results of the current survey of professionals across the EU very strongly suggest that the balance sought by the Mediation Directive does not exist, and that putting Integrated Mediation into place would dramatically raise the reliance on mediation.

In light of this considerable background of study and analysis, the authors believe it is time for comprehensive discussion and consideration of: 1) adopting a Balanced Relationship Target Number (BRTN) requirement, obligating each Member State to establish target figure that is appropriate to that state; and 2) whether and how Integrated Mediation processes should be established in the Mediation Directive as a Member State requirement for appropriate civil and commercial cases.

Biography

Prof. De Palo is President of ADR Center SpA. He is also International Professor of Alternative Dispute Resolution Law and Practice at Hamline University School of Law. In addition, he teaches International Negotiation Theory and Practice at the Interdepartmental Research Center in European and International Studies of the Sapienza Università di Roma. He is a mediator of major international business disputes.
The 2005 Hague Convention on Choice of Court and Brussels I Recast

Gottfried Musger

The entry into force of the Hague Choice of Court Convention will be a major step towards more legal security for European enterprises doing business in Non-EU Member States. Jurisdiction of State courts conferred by choice of court agreements might become a viable alternative to arbitration. However, the success of the Convention will depend on further ratifications by major economic partners of the European Union. The recast of Brussels I eliminated all possible incompatibilities between this regulation and the Convention.
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LIST OF ABBREVIATIONS


**Convention** Hague Convention of 30 June 2005 on Choice of Court Agreements (OJ 2009 L 133/3)


**CJEU** Court of Justice of the European Union
EXECUTIVE SUMMARY

Background

On 30 June 2005, the European Union signed the Hague Choice of Court Convention. This international instrument affects the application of European rules on jurisdiction and enforcement of judgments, in particular the Brussels I Regulation. In 2012, Brussels I was replaced by a “recast” (Brussels Ia) which took into account the possible ratification of the Convention. In particular, the Brussels I rule on choice of court agreements (Article 23) was brought in line with the respective provisions of the Convention (now Article 25 Brussels Ia). On 4 December 2014, the Council adopted the Decision to approve the Convention on behalf of the European Union (2014/887/EU, OJ 2014 L 353/5). Under Article 2 (2) of this Decision, the deposit of the instrument of approval shall take place within one month of 5 June 2015. The Convention shall enter into force for the Union and its Member States on the first day of the month following the expiration of three months after the deposit of the instrument of approval. If a party to a choice of court agreement is domiciled in a Contracting State of the Convention which is not a Member State of the European Union, the rules of the Convention will prevail over the respective rules of Brussels Ia.

Aim

This study intends to clarify the following issues:

- The legal situation of European enterprises doing business with Non Member States of the European Union before the entry into force of the Choice of Court Convention.
- The basic rules of the Hague Choice of Court Convention.
- The recast of Brussels I (Brussels Ia) and its compatibility with the Choice of Court Convention.
- The legal situation of European enterprises doing business with Non Member States of the European Union after the entry into force of Brussels Ia and the Hague Choice of Court Convention.
Before the entry into force of the Convention, European enterprises doing business with partners domiciled in third countries ad to face a considerable lack of legal security: If an action was brought against them in a Non Member State, the jurisdiction of this State was governed by its domestic law. As there were (and are) no European rules on the recognition and enforcement of judgments issued in Non Member States, this question had to be dealt with according to the domestic law of the Member State where enforcement was sought (including, if applicable, bilateral or multilateral enforcement conventions concluded by that State). Similarly, judgments issued in a Member State would be recognised and enforced (or indeed not recognised and enforced) in Non Member States under the domestic law of those States (including, if applicable, bilateral or multilateral enforcement conventions). This lack of legal security was (and is) one of the reasons for the widespread popularity of arbitration agreements in international contracts.

The Hague Choice of Court Convention has three basic rules: (i) If the parties have chosen a court of a Contracting State, this court must hear the case. (ii) Courts of other Contracting States must decline jurisdiction if an action is brought contrary to the choice of court agreement. (iii) Judgments of the chosen court must be recognised in all other Contracting States. There are some exceptions to these rules, but they have a limited scope.

Exceptions from the substantive scope of and a disconnection clause in the Convention ensure that the internal law of the European Union (Brussels Ia) remains untouched in cases with no connections to other Contracting States and in areas of exclusive or protective jurisdiction (e.g. immovable property, consumer cases, labour cases).

Accession to the Convention increases legal security for European businesses. Choice of court agreements will be enforced in all Contracting States. If a court of a Member State is chosen, European enterprises can be sure that there won’t be any proceedings in other Contracting States and that the judgment of the chosen court will be recognised and enforced under the Convention. Choice of court agreements might therefore become a viable alternative to arbitration.

However, the success of the Convention will depend on further accessions. Until now, only Mexico has ratified it. It will have to be seen whether the main economic partners of the EU will join the Convention. As the USA, Canada, Australia, Russia and China have actively participated in the Hague negotiations, there is a good chance that their ratifications will follow within a reasonable time.
1. THE LEGAL SITUATION BEFORE THE ENTRY INTO FORCE OF THE HAGUE CHOICE OF COURT CONVENTION

1.1. International Civil Litigation: Problems and Legal Basis

The increase of international commercial relations necessarily leads to an increase of international civil litigation. In such cases, the parties and their lawyers are confronted with the following questions of Private International Law:

- The courts of which State will have jurisdiction?
- What happens if proceedings are instituted in different States?
- Which substantive law will be applied?
- Will a judgment be recognised and enforced in other States?

Traditionally, the rules governing these questions were to be found contained in the domestic law of each State or in bilateral or multilateral conventions, the latter often concluded in the framework of the Hague Conference on Private International Law. However, the progressing European integration led to new instruments governing especially the relations between EU Member States. Until the Treaty of Amsterdam, these instruments had to be drawn up as International Conventions, i.e. the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention, 1968) and the Convention on the Law Applicable to Contractual Obligations (Rome Convention, 1980).

After the communitarisation of private international law by the Treaty of Amsterdam, these conventions were replaced by regulations: Brussels I and Rome I. They had (and have) a different structure: The conflict rules of Rome I applied (and apply) in all international contract cases irrespectively of the domicile of the parties; any law specified by Rome I is to be applied whether or not it is the law of an EU Member State. In contrast, the jurisdiction rules of Brussels I were (and to a lesser extent still are), with few exceptions, only applicable if the defendant was domiciled in an EU Member State; the rules on recognition and enforcement were (and are) limited to judgments issued in other Member States. So Brussels I was (and still is) more or less restricted to intra-EU cases. In “external” cases, parties and courts had to fall back on national law, including, if applicable, bilateral or multilateral conventions. However, in the context of commercial law, such conventions were rather rare. In particular, there was (and still is) no widely ratified international convention with a comprehensive set of jurisdiction rules for international business contracts.

1.2. Problems in “External” Cases

The lack of international instruments led to a considerable amount of legal insecurity for European enterprises doing business with partners domiciled in third countries.

- If the European party intended to bring an action, Brussels I would not apply. So the jurisdiction of each Member State would be governed by its internal law. Exorbitant fora – i.e. rules of jurisdiction in favour of the plaintiff – would apply. For instance, jurisdiction could be based on the document instituting the proceedings having been served on the defendant during his temporary presence in the State of the court, or on the presence of property belonging to the defendant within that State.

- On the other hand, the EU party was faced with the possibility of the other party suing in the State of its own principal place of business. Once again, the jurisdiction of this
State was governed by its own domestic law. So exorbitant fora of that State could be used against the European defendant as well.

- Based on that, parallel proceedings in two (or even more) States were possible: One party could bring an action for payment, and the other party could sue for damages or for a declaratory judgment on the non existence of the claim of the opposite party. This would lead to unnecessary costs for both sides.

- Except in the case of a bilateral or multilateral enforcement convention, the European enterprise could not be sure that a judgment issued in a Member State would be recognised and enforced in the State of the other party. On the other hand, there was a certain risk that a judgment passed in a Non Member States would be recognised and enforced in one or more Member States.

A choice of court agreement would not have brought legal security.

- If the parties had chosen a court of a Member State, it is true that this agreement would have been binding under Art 23 Brussels I in all Member States of the European Union. However, if the other party brought an action in a court of a Non Member State, this court would have had to determine the validity of the choice of court agreement by applying its own law. So, parallel proceedings were still possible. Moreover, the European party could not be sure that a judgment given by the chosen court would be recognised in the State of the foreign defendant.

- If the parties had designated a court of a Non Member State, it was the law of that State which determined whether this agreement really conferred jurisdiction on that court. Both parties could also try to bring an action in a Member State. As Brussels I was silent on this point, the question whether a court in a Member State was bound by a choice of court agreement designating a court of a Non Member State had to be decided according to the law of that Member State. So it depended on this law whether the other party could sue the European party in the State of its domicile (Art 2 Brussels I) and whether the EU party could use the exorbitant fora of this law to bring an action against the other party.

The only way to avoid these problems of legal insecurity was to exclude the jurisdiction of State courts by agreeing on arbitration. Under the New York Arbitration Convention, arbitration clauses were (and still are) enforced more or less all over the world. This means that State courts have to dismiss a case brought contrary to an arbitration clause, and that foreign arbitral awards are enforced in the same way as judgments or other enforceable titles.

1 CJEU C-387/98, Coreck Maritime GmbH / Handelsveem BV.
2. THE HAGUE CHOICE OF COURT CONVENTION

2.1. The Hague Judgments Project

In 1996, the Member States of the Hague Conference on Private International Law decided to start the work on a worldwide jurisdiction and enforcement convention (the “Hague Judgments Project”). The idea was that the outcome should have the form of a “mixed convention” with a “white list” of generally recognised fora applicable in all States Party, a “black list” of fora prohibited because of their exorbitant character. Judgments given by a “white” forum would have to be recognised and enforced in all States Party. Moreover, States Party would have been free to provide for additional fora, being neither on the white nor on the black list, but without an obligation of other Contracting States to enforce their judgments (“grey area”). However, the project proved to be much too ambitious. The key players – EU Member States on one side, the USA on the other – were not able to agree even on minimum contents of the black and the white list. Therefore, after a disappointing Diplomatic Conference in 2001, the Member States of the Hague Conference decided to restart the project limiting it to the only generally accepted “white” forum, i.e. the designation of a court by the parties of a dispute. It took another four years until the Hague Choice of Court Convention was finally adopted on 30 June 2005.

2.2. Scope and Content of the Choice of Court Convention

Scope

The Convention applies in international cases\(^4\) to exclusive choice of court agreements concluded in civil or commercial matters (Art 1 \([1]\)). The Convention is applicable whenever one or more courts of a State Party are exclusively chosen by the parties. It is irrelevant whether the parties are resident in a State Party or not.

In practice, the Convention will predominantly apply in the context of business contracts. On one hand, this follows from practical reasons: It is not very likely that parties who have not entered into contractual relations would nevertheless conclude a choice of court agreement. On the other hand, Art 2 (1) excludes labour and consumer contracts from the scope.

Art 2 (2) contains a list of other excluded matters, mostly of an extracontractual character (e.g. family law, wills and successions, insolvency, anti-trust matters, claims for personal injury of natural persons or for damage to tangible property [if not arising from a contractual relationship], rights in rem in immovable property, validity of IP rights other than copyright and related rights entries in public registers). Contractual matters are excluded as to the carriage of passengers and goods and to tenancies of immovable property. IP infringement proceedings are excluded from the scope except where they are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract.

Under Art 21, a Contracting State may declare that it will not apply the Convention to a specific subject matter. This allows for a unilaterally effectuated exclusion from scope where the national law of a State restricts party autonomy in a specific area which otherwise would fall under the Convention. The European Union will avail itself of this provision to make sure

\(^4\) For the meaning of the term “international case” cf. the definitions in Art 1 (2) and (3). They are very broad: For the purposes of Chapter II (jurisdiction), a case is international unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State. This means that any international link makes the Convention applicable; the only exception being the designation of a foreign court in an otherwise purely national case. For the purposes of Chapter III, a case is international where recognition or enforcement of a foreign judgment is sought.
that the limitations on choice of court agreements in insurance matters (Art 13, 14 Brussels I; Art 15, 16 Brussels Ia) will not be undermined by the Convention.

**Exclusive Choice of Court Agreements**

The Convention only applies to exclusive choice of court agreements as defined in Art 3 (a):

> (a) "exclusive choice of court agreement" means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.

A choice of court agreement which designates the courts of one Contracting State or one or more specific courts is deemed to be exclusive unless the parties have expressly provided otherwise (Art 3 [b]). It follows from this provision that the Convention is applicable whenever one or more courts of a State Party are exclusively chosen by the parties. Therefore it is irrelevant whether the parties are resident in a Contracting State or not.

According to Art 3 [c], a choice of court agreement must be concluded or documented in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference. National law may not impose further formal requirements.

According to Art 22, a Contracting State may declare that its courts will also recognise and enforce judgments given by courts designated in non-exclusive choice of court agreements. However, as the European Union will not make this declaration, this provision will not have any practical impact on European businesses.

**Three Basic Rules**

The Convention contains three basic rules which are more or less parallel to those of the New York Arbitration Convention.

- Jurisdiction of the chosen court (Art 5): If the parties have chosen a court of a Contracting State, this court must hear the case.
- No proceedings elsewhere (Art 6): Courts in other Contracting States other than the State of the chosen court must suspend or dismiss proceedings to which an exclusive choice of court agreement applies.
- Recognition and enforcement (Art 8): Judgments issued by the chosen court must be recognised and enforced in all other Contracting States.

The substantive validity of a choice of court agreement is to be determined according to the law of the State of the chosen court; an agreement that is "null and void" under this law does not give rise to the obligations mentioned above. This means that courts in other States than that of the chosen court (dealing either with an action brought contrary to the choice of court agreement, or with the enforcement of a judgment issued by the chosen court) will have to apply foreign law.

There are a few exceptions to the obligations under Art 6 and Art 8. However, these are rather narrow; despite some innovative wording, they do not go beyond what is usual in comparable international instruments.

Under Art 6, a court other than the chosen court may hear the case if

- the agreement is null and void under the law of the State of the chosen court;
a party lacked the capacity to conclude the agreement under the law of the State of the court seised;

- giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised;

- for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; or

- the chosen court has decided not to hear the case.

Recognition and enforcement of a judgment passed by a chosen court may only be refused if one of the grounds of refusal specified in Art 9 applies. Two of them refer to the choice of court agreement as such, parallel to the first two points in the list of Art 6 (choice of court agreement being null and void under the law of the State of the chosen court, lack of capacity), the other grounds are more or less typical for international enforcement conventions (service of documents, public policy, judgment obtained by fraud, inconsistency with other judgments). A special provision (Art 10) deals with the recognition and enforcement of judgments where a judgment was based on a preliminary ruling on a matter excluded from the scope of the Convention. Enforcement of punitive damages may be refused if and to the extent that they „do not compensate a party for actual loss or harm suffered“ (Art 11).

**Relationship with Other International Instruments**

One of the major practical problems in private international law is the multiplicity of international instruments. In general, every instrument determines its own scope. This may lead to a situation where more than one instrument “want” to be applied in a particular situation. In such cases, it can be rather difficult to identify the correct legal basis.

This problem can be dealt with either by excluding specific substantive matters from the scope of one of the instruments or by so called “disconnection clauses”. Such clauses determine which of two or more conflicting instruments will be applied in a given situation. A typical example is Art 71 (1) Brussels I / Brussels Ia:

> This Regulation shall not affect any conventions to which the Member States are parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

“Shall not affect” means that Brussels I / Ia will not apply as far as its rules are incompatible with those of a convention on a “particular matter” (e.g. on Nuclear Liability).

The Choice of Court Convention contains a rather elaborated disconnection clause in Art 26. Paragraph 1 gives a general rule of interpretation (“This Convention shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention”), paragraphs 2 to 5 deal with the relationship between the Convention and other international treaties. Those provisions follow more or less traditional lines. Paragraph 6 however covers a new question. It determines the relationship between the Convention and rules of a *Regional Economic Integration Organisation*. Though worded in abstract terms, this provision was specifically drafted with a view to Brussels I.

Two options had been discussed. The more innovative would have been a *Federal State analogy*. This would have meant that, for the purpose of the Convention, the European Union would have been treated like a federal State; Brussels I would have had the same legal significance (or non-significance) as internal jurisdiction rules of a federal State, for instance the US.

However, this analogy was not acceptable for some Member States. So the disconnection clause in Art 26 (6) was drafted in a traditional way:
This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention -

a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;

b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

By virtue of this provision, the Convention gives way to a regional instrument – in particular to Brussels Ia – if the conditions specified in [a] or [b] are met.

Letter b) above is easy and clear: The rules on recognition and enforcement of the regional system prevail. This means that the European Union rules on recognition and enforcement of judgments – not only those of Brussels Ia, but also the relevant provisions in the Enforcement Title Regulation, the Order for Payment Regulation and the Small Claims Regulation – will continue to apply without any restriction.

The disconnection as to jurisdiction is a bit more complicated. Under [a], the Brussels Ia rules have precedence where none of the parties is resident in a State Party of the Convention that is not Member State of the EU. This provision has a remarkable pro-EU-bias: The European jurisdiction rules not only apply in purely “internal” cases of the EU (where both parties are resident in a Member State), but also in “external” cases with no connection to other States Party. However, as most incompatibilities between the Convention and Brussels I have been eliminated by the Brussels I recast (see below 3.2.), this disconnection clause has a rather limited practical impact.

Accession by Regional Economic Integration Organisations

Articles 29 and 30 make provision for a Regional Economic Integration Organisation to become a party to the Convention. Whereas Art 29 covers a situation where there is a shared (mixed) external competence of the Organisation and its Member States as to the subject matter of the Convention, Art 30 applies to the Accession of an Organisation that enjoys exclusive external competence. In the latter case, the Organisation has to declare, at the time of signature, acceptance, approval or accession, that it exercises competence over all the matters governed by the Convention and that its Member States will not be parties to this Convention but shall be bound by virtue of the signature, acceptance, approval or accession of the Organisation. In this case, any reference to a "Contracting State" or "State" equally applies, where appropriate, to the Member States of the Organisation.

The accession of the European Union falls under the second alternative. Therefore only the EU has signed and will approve the Convention, the Member States will be bound by virtue of the accession of the EU. Any reference in the Convention to “Contracting States” has to be read as including the Member States of the EU as well.

In principle, the Convention would have precedence over internal provisions of the EU, in particular over Brussels Ia (Art 216 [2] TFEU). However, as mentioned above, the Convention itself provides that the rules of a Regional Organisation remain untouched in the situations specified in Art 26 (6) of the Convention. So in practice, the Convention prevails only in cases where there is a link to a Contracting State that is not a Member State of the EU.

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3. THE CHOICE OF COURT CONVENTION AND THE RECAST OF BRUSSELS I

3.1. Incompatibilities between Brussels I and the Convention

In theory, accession of the European Union to the Convention might have been possible without any changes of the Brussels I system. In this case, the rules of the Regulation would have continued to apply in situations as specified in Art 26 (6) of the Convention; otherwise – i.e. where one of the parties was domiciled in a State Party to the Convention not being a Member State of the EU - the rules of the Convention would have had precedence. However, this might have led to major problems for practitioners (except for real specialists of private international law). There were at least three points where, because of different rules in the Convention and in Brussels I, misapprehensions in the application of the two instruments were possible.

Territorial Scope of the Provision on Choice of Court Agreements

Art 23 Brussels I only applied if one of the parties to the choice of court agreement was domiciled in a Member State. The effects of a choice of court agreement concluded by parties not domiciled in the EU were therefore governed by the national law of the State of the chosen court. On the other hand, Art 26 (6) of the Convention provides that the rules of a Regional Economic Integration Organisation prevail whenever no party resides in a Contracting State that is not a Member State of the Organisation. Choice of court agreements of two parties resident in States that are neither Contracting States of the Convention nor Member States of the Organisation would therefore fall under the rules of the Organisation – which however, under Brussels I, simply did not exist.

Substantive Validity and Form Requirements

Under the Convention, the substantive validity of a choice of court agreement is determined according to the law of the chosen court. The Brussels I provision on choice of court agreements (Art 23) had no similar rule. So it was not clear which law would decide in the case of a dispute on the substantive validity of a choice of court agreement. There was also a difference as to the formal requirements: Under the Convention, a choice of court agreement must be concluded or documented in writing, whereas under Brussels I, there are four possible forms: (i) in writing, (ii) evidenced in writing, (iii) a form according to the practices established between the parties, and (iv), in international trade or commerce, a form according to a usage widely known and observed in similar contracts.

Choice of Court Agreements and lis pendens

Under Art 6 (1) of the Convention, any court seised contrary to a choice of court agreement has to decline jurisdiction. If it erroneously fails to do so, the chosen court is nevertheless obliged to hear the case. The lis pendens rule in Art 27 Brussels I led to a different result: In the case of parallel proceedings on the same cause of action, the court second seised had to stay its proceedings; when the jurisdiction of the court first seised was established, the court second seised had to decline jurisdiction. This was even the case if the court second seised was designated in a choice of court agreement. So the lis pendens rule of Brussels I prevailed over a choice of court agreement.

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8 However, Brussels I provided that courts of other Member States had no jurisdiction unless the chosen court had decided not to hear the case (Art 23 (3)).
9 Both instruments have an additional rule for choice of court agreements concluded by electronic means. Though the wording is different, they have basically the same content: The agreement is valid if the electronic means provide a durable record thereof.
10 CJEU C-116/02, Gasser/MISAT, n° 49.
3.2. The Elimination of those Incompatibilities

Territorial Scope of the Provision on Choice of Court Agreements

The Brussels Ia rule on choice of court agreements is now applicable “regardless” of the domicile of the parties (Art 25 [1]). So there is no need any longer to fall back on national law if a choice of court agreement designating a court of a Member State was concluded by parties resident neither in a Member State of the European Union nor in another Contracting State of the Convention.\(^{11}\)

Substantive Validity and Form Requirements

Under Art 25 (1) Brussels Ia, a choice of court agreement is binding “unless it is null and void null as to its substantive validity” under the law of the Member State of the chosen court. This takes up the language of Art 5, Art 6 and Art 9 of the Convention. So from a practical point of view, it is irrelevant whether a choice of court agreement the substantive validity of which is challenged falls under the Convention or under Brussels Ia.

In contrast, the form requirements are still different. However, this will not cause any problems: Both instruments accept agreements concluded “in writing”; the meaning of “documented in writing” (Convention) and “evidenced in writing” (Brussels Ia) should not be too different. If a court of a Member State is designated in one of the two other forms foreseen under Art 25 Brussels Ia (but not under the Convention), only Brussels Ia would apply. So both the chosen court and all other courts in the European Union would be bound by the choice of court agreement. However, it would be possible that a court of another Contracting State would hear the case; and a judgment issued by the chosen court would not be recognised and enforced under the Convention.

Choice of Court Agreements and lis pendens

The most striking innovation of the recast is the reversing of the lis pendens rule in cases of choice of court agreements. Art 31 (2) and (3) of Brussels Ia provide as follows:

(2) Without prejudice to Article 26\(^{12}\), where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.

(3) Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court.

Under this rule, it is the chosen court which decides on the validity of the choice of court agreement, not the court first seised. This strengthens the concept of party autonomy: A breach of a choice of court agreement is not any longer rewarded by the precedence of the court first seised.

Example: A contract between A and B contains a choice of court agreement designating the commercial court of Vienna. Contrary to this agreement, A sues in the commercial court of Budapest for a declaratory judgment that he does not owe anything to B. Three days later, B sues for payment in the designated court in Vienna. Under the old rule (Art 27 Brussels I), the Vienna court – being the court second seised – had to stay its proceedings. The Budapest court would then decide about its own competence. If this court – even erroneously - accepted its

\(^{11}\) Moreover, Art 23 (3) Brussels I had become redundant.

\(^{12}\) Under Art 26 Brussels Ia, a court becomes competent if the defendant enters an appearance without contesting jurisdiction. The reference to this provision is a consequence of party autonomy: Even if the parties had designated a specific court, they can afterwards agree to submit their dispute to another court. Entering an appearance without contesting jurisdiction is one possible way to accept the jurisdiction of a court not designated in a previous choice of court agreement.
jurisdiction, the Vienna court had to dismiss the case. Under the new rule (Art 31 Brussels Ia), it is the Budapest court which has to stay its proceedings until the Vienna court has decided on the validity of the choice of court agreement. The Budapest court could only hear the case if the Vienna court dismissed the case (e.g. because the choice of court agreement was null and void under Austrian law).

Art 31 Brussels Ia deals with parallel proceedings pending in courts of two or more Member States. Where the parties had designated a court of a Contracting State that is not a Member State of the EU, Art 6 of the Convention basically leads to the same result if, despite the choice of court agreement, an action is brought in a court of a Member State: This court has to suspend or dismiss proceedings unless one of the exceptions specified in Art 6 (a) – (e) applies. Whereas Art 6 (e) is parallel to Art 31 (2), Art 6 (a) – (d) provide for a slightly broader margin of appreciation for the Member State court not to enforce the choice of court agreement.

Example: Suppose Canada is a State Party to the Convention. A contract between the German company A and the Canadian company B contains a choice of court agreement designating the commercial court of Toronto. Contrary to this agreement, A sues in the regional court of Munich for a declaratory judgment that it does not owe anything to B. Three days later, B sues for payment in the designated court in Toronto. Before the entry into force of the Convention, the German court would have applied German law to decide how to deal with the proceedings, and the Canadian court would have applied Canadian law. Parallel proceedings would have been possible. Under the Convention, the Canadian court has to hear the case unless the choice of court agreement is null and void according to Canadian law (Art 4 of the Convention). The German court could only hear the case if one of the exceptions of Art 6 of the Convention applied. It is irrelevant whether the Canadian or the German court was seised first.

The Convention does not deal with choice of court agreements designating courts of Non Contracting States. Under Brussels I, the CJEU held that the question whether such agreements excluded the jurisdiction of courts of Member States was to be decided according to the national law of the Member State whose court was seised contrary to the choice of court agreement. So if a German and a USA company had concluded a choice of court agreement designating a court in the USA, it was to be decided according to German law whether the US company could sue the German company in a German court. This could lead to parallel proceedings. As there was no rule on lis pendens situations involving a Non Member State in Brussels I, the time at which the courts had been seised was irrelevant for the decision of the German court. Contrary to that, Brussels Ia contains a rule on parallel proceedings in third States (Art 33). Under this provision, it seems that a court of a Member State the jurisdiction of which is based on Art 4, 7, 8 or 9 Brussels Ia could only stay its proceedings or dismiss the case if the court of the Non Member States was first seised. As there is no exception for choice of court agreements designating a court of a third State, it is an open question whether the above-mentioned CJEU judgment would still apply. Under Art 33 Brussels Ia, it could be argued that a court of a Member State could take into account a choice of court agreement designating a court of a third State only if this court had been seised first. However, this problem could only arise in very exceptional cases.

Example: Suppose Canada is not a State Party to the Convention. A contract between the German company A, which has a branch in Canada, and the USA Company B contains a choice of court agreement designating the commercial court of Toronto. Contrary to this agreement, A sues in the regional court of Munich for a declaratory judgment that it does not owe anything to B. Three days later, B sues for payment in the designated court in Toronto. Under Brussels I, the German court would have applied German law to decide whether the choice of court agreement

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13 As the defendant is not domiciled in a Member State, the jurisdiction of the Munich court could be based on German law (cf Art 6 Brussels Ia).
14 CJEU C-387/98, Coreck Maritime GmbH / Handelsveem BV.
had any impact on its jurisdiction. The same would be true under Brussels Ia: As the defendant is a Canadian company, the jurisdiction of the German court could not be based on Art 4, 7, 8 or 9 Brussels Ia (those provisions being only applicable where the defendant is domiciled in a EU Member State). Therefore, Art 33 would not apply, and the question mentioned above would not arise.

However, suppose that B (the USA company) sues for payment in Munich, and three days later, A (the German company with a branch in Canada) sues for a declaratory judgment in Toronto. Under Brussels I, the legal situation would have been the same as described above: The Munich court would have applied German law to decide whether the choice of court agreement had any impact on its jurisdiction. Under Brussels Ia, the situation might be different: As the jurisdiction of the Munich court is based on Art 4 Brussels Ia (domicile of the defendant), Art 33 Brussels Ia applies. Under this provision, it seems that the Munich court could only stay its proceedings or dismiss the case if the Toronto court was first seised. If not, the Munich court would have to exercise its jurisdiction despite the choice of court agreement.

However, it has to be stressed that this only applies to choice of court agreements designating a court of a State not Party to the Convention. Where a court of a State Party was chosen, Art 6 of the Convention would apply and thereby exclude the lis pendens rule of Art 33 Brussels Ia.15

3.3. Other New Provisions

According to the new Art 25 (5) Brussels Ia, an „agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.“ This provision is parallel to Art 3 (d) of the Convention.

3.4. The Obligation not to Hear the Case

Under Art 6 of the Convention, the obligation not to hear the case applies unless one of five conditions is met. The fifth one – the chosen court has decided not to hear the case - is not problematic, as it is mirrored by Art 31 (2) Brussels Ia. But could a court in Member State A make use of the exceptions (a) to (d) to exercise jurisdiction if the parties had chosen a court of Member State B? Certainly not if, according to Art 26 (6) of the Convention, the provisions of Brussels Ia prevail over those of the Convention. Then Art 25 (1) and Art 33 Brussels Ia apply, and the court of Member State A could only exercise jurisdiction if the choice of court agreement is null and void under the law of State B or if the chosen court had decided not to hear the case. But what if Art 26 (6) does not apply because one of the parties is resident in a State Party to the Convention that is not a Member State of the European Union? In this case, it could be argued that the court of Member State A could apply one of the exceptions in Art 6 of the Convention and (for instance) hear the case despite of the choice of court agreement because “giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised” (Art 6 [c]).

However, this argument would give too much weight to the exceptions in Art 6. If one of them is met, only the prohibition against hearing the case is lifted. This does not mean that a court other than the chosen court has jurisdiction or is obliged to exercise jurisdiction.16 So there is no real conflict between the Convention and Brussels Ia: Not being obliged to dismiss the case under Art 6 of the Convention is in no way incompatible with the duty to decline jurisdiction under Brussels Ia.

15 Except perhaps in a situation where Brussels Ia would have precedence under Art 26 (6). However, this would only apply where no party is resident in a State Party to the Convention that is not a Member State of the EU. In this case, it would be rather unlikely that the parties would nevertheless designate a court of such State Party.

16 Cf. Report, paragraph 146:
Example: A contract between the German company A and the French Company B contains a choice of court agreement designating the commercial court of Vienna. Contrary to this agreement, A sues in the regional court of Munich for a declaratory judgment that it does not owe anything to B. According to Art 26 (6) of the Convention, the rules of Brussels Ia have precedence over those of the Convention. Under these rules it is clear that the Munich court has to dismiss the case, even if “giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised” in the sense of Art 6 (c) of the Convention.

But suppose that B is a Canadian company and Canada is a State Party to the Convention. Nevertheless, the parties chose the commercial court of Vienna. Contrary to this agreement, A sues in the regional court of Munich for a declaratory judgment that it does not owe anything to B. As the conditions of Art 26 (6) of the Convention are not met, Art 6 of the Convention applies without any restriction. In principle, the Munich court would have to suspend the proceedings or dismiss the case, which is parallel to its obligation under Brussels Ia. But what if the court comes to the conclusion that “giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised”? Under Art 6 (c) of the Convention, the Munich court would not be barred to hear the case. However, as a court of another Member State had been chosen, the Munich court would still be bound by Brussels Ia. As this Regulation has no provision similar to Art 6 (c) of the Convention, the Munich court would therefore have to decline jurisdiction.
4. THE LEGAL SITUATION AFTER THE ENTRY INTO FORCE OF THE HAGUE CHOICE OF COURT CONVENTION

4.1. Entry into Force

According to Art 31 (1), the Convention shall enter into force on the first day of the month following the expiration of three months after the deposit of the second instrument of ratification, acceptance, approval or accession. As the European Union will be the second Contracting Party to join the Convention, entry into force of the Convention will depend on the deposit of the document of approval as specified in the Council Decision 2014/887/EU. As under Article 2 (2) of this decision, the deposit shall take place within one month of 5 June 2015, the Convention should enter into force either on 1 October or 1 November 2015.

The Convention will apply to exclusive choice of court agreements concluded after its entry into force for the State of the chosen court (Art 16 [1]); it will not apply to proceedings instituted before its entry into force for the State of the court seised (Art 16 [1]). This provision has rather unexpected consequences for recognition and enforcement: If a choice of court agreement was concluded after the entry into force of the Convention in the State of the chosen court, a judgment issued by this court will be recognized and enforced in other Contracting States even if the Convention had entered into force in those States long after the date of the judgment.

4.2. Consequences for International Litigation

Importance of Further Ratifications

The practical consequences of the entering into force of the Convention depend on further ratifications. At present, the only other Party is Mexico. So the entry into force of the Convention will not lead to its application in the relations with major business partners of the European Union (e.g. Canada, China, Korea, Russia, Turkey, USA). This does not make life easier for businesses and lawyers: Until the entering into force of the Convention, the only question was whether Brussels I/Ia was applicable or not. If not, national law had to be applied. Now, the possible applicability of the Convention must also be taken into account.

However, a considerable number of major EU business partners – in particular the US, Russia, China, Korea and Australia - have played a very active role in the negotiations leading to the Convention, and there might be a good chance that their ratifications will follow. But the political probability of such developments is beyond the scope of this study.

Increase of Legal Security

If some key players follow the example of the European Union, the Convention will provide a much higher level of legal security for European enterprises. As far as their business relations within the European Union are concerned, nothing changes. Because of the disconnection clause in Art 26 (6) of the Convention, the rules of Brussels Ia continue to apply, and the Convention has no practical impact. The same is true in the case of contracts with partners resident in Non States Party to the Convention: If the parties designated a court of a Member State, Brussels Ia would apply, but the European party could not be sure that the judgment of this court would be recognised and enforced in the State of the other party; and it would even be possible that a court of that State accepted jurisdiction despite the choice of court agreement. In this context, arbitration remains the only way to have legal security: If the parties enter in an arbitration agreement, the New York Convention applies. Any court of a Contracting State of this Convention would be obliged not to hear the case, and the award issued by the arbitral tribunal would be enforced in all Contracting States.

However, if European enterprises enter into contracts with partners resident in other Contracting States of the Convention, they have an additional option to plan for the case of a
contractual dispute. Instead of opting for arbitration, they can designate a court of a Contracting State of the Convention. In this case, the parties can be sure that, with very limited exceptions,

- the chosen court will hear the case.
- courts of other Contracting States will decline jurisdiction, and
- judgments of the chosen court will be recognised and enforced in all Contracting States.

This legal framework is parallel to that of the New York Convention. Choice of court agreements may therefore prove to be a viable alternative to arbitration. There is no doubt that this competition of systems is in the best interest of all economic players. States might wish to make proceedings in their courts even more attractive, e.g. by reducing court fees or introducing new rules for fast track procedures. On the other hand, the arbitral community\textsuperscript{17}, being faced with the possibility that businesses could opt for choice of court agreements instead of choosing arbitration, might be induced to improve the quality of arbitration proceedings and to lessen their costs. Moreover, if choice of court agreements are really accepted as an alternative to arbitration, the ongoing privatisation of justice in international business relations, which is a consequence of the worldwide success of the New York Convention, could be brought to a halt.

However, it is obvious that the advantages of choice of court agreements depend on the economic strength of the parties. In the case of a contract between a European and a foreign company – the latter being domiciled in a Contracting State of the Convention that is not a Member State of the EU - , the European party will clearly benefit from the Convention if a court of the Member State of this party is chosen. In this case, the European company can sue at home and is protected from being sued abroad; the decision of the chosen court will be enforced at the place of the other party. If, however, the European company has to enter into a choice of court agreement designating a court in the State of the other party, it goes the other way round. The company looses possible fora which might exist under its national law\textsuperscript{18}, and a decision of the foreign court will be enforced in all Member States of the European Union. But this is not specific to the Choice of Court Convention: The concept of party autonomy generally favours economic players who are in a position to get their own objectives accepted by the other party. This is the reason why Brussels I/Ia limits party autonomy where contracts are concluded between businesses and (typically) weaker parties (consumers, employees, policy holders). As such contracts are excluded from the scope of the Convention – by virtue of an express provision concerning consumer and labour contracts (Art 2 [1]) and of a declaration of the EU under Art 21 concerning insurance contracts - these restrictions of the EU system are not affected by the entry into force of the Convention.

**Multiplicity of International Instruments**

The mere existence of the Convention will contribute to the multiplicity of international instruments in the area of private international law. There will certainly be situations where both the Convention and other treaties or instruments of regional integration organisations seem to be applicable. In such cases, it will be important to make a precise assessment of the scope of the (seemingly) conflicting instruments and of the respective disconnection clauses. Legal advice in drafting international contracts will therefore be far from superfluous. But once again this is not a specific problem of the Convention: One cannot expect to have simple legal solutions for complex business transactions. The increase of legal security for contracts with choice of court agreements definitely outweighs the possible problems caused by conflicts between different private international law instruments.

\textsuperscript{17} Lawyers acting as arbitrators or as representatives in arbitration proceedings.

\textsuperscript{18} If the defendant is not domiciled in Member State, the jurisdiction of each Member State is, in general, determined by the law of that Member State (Art 6 Brussels Ia).
5. CONCLUSION

The entering into force of the Hague Choice of Court Convention will be a major step towards more legal security for European enterprises doing business in Non Member States. Jurisdiction of State courts conferred by choice of court agreements might become a viable alternative to arbitration. However, the success of the Convention will depend on further ratifications by major economic partners of the European Union. As long as this is not the case, the practical impact of its entering into force will be marginal at best.

Biography

Dr. Gottfried Musger is a judge, having started his judicial career in 1995 and has been a judge at the Supreme Court of Justice in Vienna (Austria) since 2006. His main areas of work are intellectual property and unfair competition law. Prior to his appointment as a judge, he had worked as a research assistant at the Universities of Graz and Saarbrücken. From 1997 to 2005 he was a delegate of the Austrian government to working groups of the European Union on questions of international civil procedure and to the Hague Conference on Private International Law.
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