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Current gaps and future perspectives in European private international law: towards a code on private international law?

NOTE

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LEGAL AFFAIRS

Current gaps and future perspectives in European private international law: towards a code on private international law?

NOTE

Abstract

Private international law is to a great extent regulated by EU rules. However, particular areas are still governed by national rules. This paper identifies the existing gaps in the EU regulatory framework, and discusses future perspectives. In the short and the mid term, the focus should be on filling gaps by using separate instruments, while preserving coherence. In the long term a more comprehensive framework or code would be an option.

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EXECUTIVE SUMMARY

Background

Private international law was traditionally a matter of national law. And although Europe has taken an interest in the matter since the 1957 Treaty, due to lack of competence only two private international law conventions were in place until the turn of the century. The 1997 Amsterdam Treaty introduced the competence regarding 'judicial co-operation in civil matters', and the three core issues of private international law – international jurisdiction, the applicable law, and the recognition and enforcement of foreign judgments – are now included in Article 81(2)(a) and (c) TFEU. Private international law competence covers the full ambit of private law matters, but it should be noted that in principle the adoption of family law measures requires unanimity (Article 81[3]) TFEU). To date, thirteen regulations and two directives on judicial cooperation in civil matters are in force, while several proposals are pending. Certain sector-specific directives also contain incidental private international law rules. Together, these instruments cover a wide range of topics. However, they still leave gaps. Further, the co-existence of these instruments sometimes leads to a recurrence of rules, increasing the volume of EU law and potentially diminishing accessibility.

This briefing note results to a large extent from a study requested by the European Parliament (study IP/C/JURI/IC/2012-009), entitled 'A European framework for private international law: current gaps and future perspectives.' This study was conducted by Dutch experts from the T.M.C. Asser Institute (contractor), the International Legal Institute, and Erasmus University Rotterdam, in consultation with a group of experts from across the EU. It was carried out under the scientific directorship of the present author.

Aims

The aims of this briefing note and the study mentioned are:

- To identify existing gaps in the current EU framework of private international law;
- To discuss where additions to this EU framework are required;
- To deliberate on the question of whether a more comprehensive framework – or eventually a European private international law code – is needed and, if so, how this can be achieved.

Relevance for EU Policy and the EU Citizen

EU private international law instruments are important to support the proper functioning of the internal market and free movement within the EU, and for strengthening a genuine area of justice. They are of great significance to European citizens in situations involving a cross-border element. These include consumers that buy goods or obtain services from companies in other Member States; companies that transact cross-border business; infringements of personality rights or other types of tortious conduct resulting in damage (*e.g.* traffic accidents) involving cross-border elements; marriage and divorce between nationals or residents from different Member States; and related questions on parental responsibility, maintenance, and matrimonial property. In such cases, private international law instruments distribute jurisdiction among the Member States, provide certainty on the applicable law, and facilitate the recognition and enforcement of foreign judgments and of authentic documents. Not only EU citizens but also legal practitioners and courts benefit from a coherent and accessible EU private international law framework.

Findings

Gaps in the existing framework are a result of (1) the willed territorial limitation of EU legislation (*e.g.* of the Brussels I Regulation); (2) the deliberate exclusion of certain topics for various reasons (*e.g.* personality rights in Rome II); and (3) the absence of legislation on specific topics. The true gaps in the framework are the systematic ones, the subject matter that is currently not regulated by the framework at all. In the area of the law of obligations, the most important gaps concern:

- Property;
- Trusts;
- Agency;
- Corporations.

In the area of family law, these gaps concern:

- Marriage;
- Registered partnerships and similar institutions;
- Names of natural persons;
- Adoption;
- Parentage;
- Protection of adults;
- Status and capacity of natural persons in general.

These gaps relate primarily to the applicable law, though in some areas rules on international jurisdiction and on recognition and enforcement are also lacking. Insofar as areas are already covered by conventions of the Hague Conference on Private International Law (*e.g.* adoption) for several or most of the Member States, a close collaboration with the Hague Conference is desirable.

For the short and the mid term, it is recommended to continue on the path of gradual rather than simultaneous adoption. This means filling the gaps by using separate instruments, while preserving coherence between the individual instruments. Though the idea of a European private international law code is attractive for various reasons, the political reality is that it may be difficult to obtain sufficient support in the near future. The diverging views on general concepts of private international law (*e.g.* the role of overriding mandatory law and the application of foreign law) and the differences in the substantive law (*e.g.* in the area of registered partnerships, same-sex marriages, and names) are likely to raise obstacles. In this regard, it should be pointed out that the special position held by the UK, Ireland, and Denmark has already resulted in territorial fragmentation, and it can be expected that proposals for a code will not improve this status.

For feasibility reasons, in the completion of the framework, the non-family issues can be prioritised, followed by the family law area. In view of the special legislative procedure for family law measures, in the absence of unanimity, the procedure of enhanced cooperation is an option. The Rome III Regulation on the law applicable to divorce, in which fifteen Member States currently participate, is the first piece of legislation using this procedure. An advantage is that policy goals to establish an instrument can be achieved. An evident disadvantage is that it results in a 'two-speed Europe' that accentuates the different views in the Member States.

In the long term, once the gaps have been filled, and the general concepts of private international law are developed further in a European context, a more comprehensive private international law framework or 'code' can be considered.

1. INTRODUCTION

Private international law rules come into operation as soon as a legal relationship of a private law nature has international elements. Examples include a marriage or divorce between persons having different nationalities and/or habitual residences, as well as the legal consequences, including parental responsibilities, matrimonial property, and maintenance; companies that transact cross-border business and consumers that buy goods or obtain services in other Member States; tortious conduct resulting in damage, *e.g.* a traffic accident involving persons domiciled in different countries; and infringement of personality rights or intellectual property rights on internet sites accessible in different countries. In these cross-border cases, private international law rules aim to provide an answer to three main questions, involving the law applicable to the legal relationship; the court having jurisdiction in relation to a dispute; and the cross-border recognition and enforcement of a foreign judgment, or an authentic instrument (*e.g.* a notarial deed). A fourth category consists of 'residual' questions of judicial co-operation, notably the cross-border service of legal documents and the taking of evidence.

Private international law was traditionally a matter of national law, and is to a certain extent regulated in conventions, particularly those of the Hague Conference on Private International Law. In 1997, the Amsterdam Treaty introduced the competence regarding 'judicial co-operation in civil matters'. EU private international law instruments are important to support the proper functioning of the internal market, to facilitate free movement of citizens and businesses within the EU, and to strengthen a genuine area of justice. Since the turn of the century, an extensive framework of private international law has been established. However, the current framework still leaves gaps, and the question is whether further regulation is required and, if so, what the way forward should be.

This briefing note is to a large extent based on a report written at the request of the Committee on Legal Affairs of the European Parliament, entitled 'A European framework for private international law: current gaps and future perspectives'[1]. The aims of this research are to identify existing gaps in the current EU framework of private international law, and to determine where additions to this EU framework are required. Further, it deliberates on the question of whether a more comprehensive framework – or eventually a European private international law code – is needed and, if so, how this can be achieved. The scope is limited to the three core issues traditionally belonging to private international law: namely, international jurisdiction, the applicable law, and recognition and enforcement.

The inventory of the existing framework and the gaps is done primarily on the basis of an analysis of existing rules, while case law and literature are taken into account where relevant. It should be noted that the deliberations of the required additions, and particularly of the desirability and feasibility of a more comprehensive framework or code in the study, is also the result of deliberations between the authors of the report and within the expert group consisting of scholars from across the EU. The research endeavours to set out a common core, and the findings do not necessarily reflect individual opinions.[2]

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[1] Study IP/C/JURI/IC/2012-009. This study was conducted by Dutch experts from the T.M.C. Asser Institute (contractor), the International Legal Institute, and Erasmus University Rotterdam, in consultation with a group of experts from across the EU. It was carried out under the scientific directorship of the present author. The author expresses thanks to the other authors of the report, Mr Michiel de Rooij, Dr Vesna Lasić, Ms Lisette Frohn, and Dr Richard Blauwhoff, as well as to the external experts, Prof. Dr Paul Beaumont (United Kingdom), Dr Agnieszka Frackowiak-Adamska (Poland), Prof. Dr Franciso Garcimartin (Spain), Prof. Dr Jan von Hein (Germany), Prof. Dr Miklos Kiraly (Hungary), and Prof. Dr Ulla Liukkunen (Finland).

[2] The present author supports the main findings of the report as also expressed in this note.

2. EXISTING FRAMEWORK AND GAP IDENTIFICATION

2.1 EU Competence and Policy on Private International Law

In 1999, when the Treaty of Amsterdam entered into force, the Community was afforded competence to take measures in the field of private international law. Although Article 65 EC Treaty legitimised the taking of these measures with a reference to the *proper functioning of the internal market*, these measures must also, and maybe primarily, be understood within the context of the establishment of an *area of freedom, security, and justice*. The policy aim to gradually establish an area of justice was first articulated in Article 61 EC Treaty. Its successor, Article 67 TFEU, no longer mentions the 'gradual establishment' of such an area, but simply states that the Union 'shall constitute an area of freedom, security, and justice'. Article 67(4) TFEU provides that the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Article 81 TFEU deals with judicial co-operation in civil matters, and currently provides the legal basis for private international law matters covered by this research.[3] It is noteworthy that the proper functioning of the internal market is still mentioned in Article 81(2) TFEU, but no longer seems to be a strict requirement for the purpose of private international law measures, as is evidenced by the addition of the word 'particularly'. Within the context of negotiations on specific existing instruments, in particular the Rome II Regulation,[4] the international market requirement under Article 65 EC was debated in view of the 'universal' territorial scope of this instrument (expanding to non-EU torts, parties, and laws).[5] However, eventually it was not regarded an obstacle.

The EU competence covers the full ambit of private law matters. However, in the area of *family law*, a special legislative procedure requiring unanimity will in principle have to be followed. Under the TFEU, unanimity is not an absolute precondition. On the basis of the 'passerelle' clause of Article 81(3) TFEU, the Council, acting unanimously and after consultation with the Parliament, could decide to follow the ordinary legislative procedure in respect of a clearly determined aspect of family law. Such a decision will not be adopted if it is opposed by national Parliaments within six months. This special procedure makes the adoption of measures in the family law area more difficult than in the non-family area.

The importance of harmonisation and codification of private international law was highlighted by the *Tampere presidency conclusions* (1999), the *Hague Programme* (2004), and the current *Stockholm Programme* (2009). The Tampere conclusions stated that in a genuine European area of justice, the incompatibility or complexity of legal and administrative systems in the Member States should neither prevent nor discourage individuals and businesses from exercising their rights. The strengthening of the principle of mutual recognition was called for, and the Council endorsed this principle as the cornerstone of judicial co-operation, and as a consequence, the presidency conclusions

[3] TFEU largely reiterates Article 65 EC Treaty, but adds a couple of topics on which measures are to be taken.

[4] Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[5] See *inter alia* A. Dickinson, *The Rome II Regulation. The Law Applicable to Non-Contractual Obligations*, Oxford University Press, 2008, p. 91-92, who argues that the internal market requirement should be taken seriously. In favour of a universal scope: M. Wilderspin, The Rome II Regulation. Some policy observations, Nederlands Internationaal Privaatrecht 2008, p. 410-412; X.E. Kramer, The Rome II Regulation on the Law Applicable to Non-Contractual Obligations: The European private international law tradition continued, Nederlands Internationaal Privaatrecht 2008, p. 414-415.

supported the abolition of exequatur (intermediate measures for enforcement). The abolition of exequatur has now been achieved in the context of five regulations for specific areas, and it will extend to the key instrument for European litigation, the Brussels I Regulation, as a result of the Recast.[6] An important point relating to the Hague Programme as regards the present research concerns the need for further coherence of the existing instruments. The current policy of enacting separate instruments for each area entails the risk of incoherence and the unnecessary duplication of rules. The current Stockholm Programme focuses primarily on the further strengthening of the principle of *mutual trust*, by establishing minimum procedural standards. It further prioritises citizens' rights, *inter alia* by promoting the full exercise of the *right of free movement*. Private international law measures are required to support the free movement of citizens, particularly those in the area of family law and involving measures related to Union citizenship.

2.2 The Existing European Framework

In the 21st century, the regulation became the instrument of choice for EU legislature in the area of private international law. Since 2000, thirteen regulations have been adopted and are currently in force. Eleven of these fall within the scope of this study on international jurisdiction, the applicable law, and recognition and enforcement.[7] In the area of patrimonial law (non-family and succession), these are the:

- Brussels I Regulation, No. 44/2001 (jurisdiction, recognition and enforcement), and the ancillary Regulations on a European Enforcement Order, No. 805/2004; a European Order for Payment Procedure, No. 1896/2006; and a European Small Claims Procedure, No. 861/2006;
- Insolvency Regulation, No. 1346/2000 (jurisdiction, applicable law, recognition and enforcement);
- Rome I Regulation, No. 593/2008 (applicable law contractual obligations);
- Rome II Regulation, No. 864/2007 (applicable law non-contractual obligations).

In the area of family law and succession, these are the:

- Brussels IIbis Regulation, No. 2201/2003 (jurisdiction, recognition and enforcement divorce and parental responsibility);
- Maintenance Regulation, No. 4/2009 (jurisdiction, applicable law, recognition and enforcement);
- Rome III Regulation, No. 1259/2010 (applicable law divorce; enhanced cooperation)
- Succession Regulation, No. 650/2012 (jurisdiction, applicable law, recognition and enforcement).

Currently, two further proposals are pending regarding regulations on jurisdiction, the applicable law, and recognition of enforcement on matrimonial property regimes and property consequences of registered partnerships.[8]

It should be noted that in principle Denmark does not take part in the adoption of measures on the basis of Article 81 TFEU (Protocol 22, TEU/TFEU), though on the basis of an agreement, Denmark does apply the Brussels I and the Service Regulation. Participation by Ireland and the United Kingdom is dependent on these Member States' decision to opt in

[6] See, *inter alia*, X.E. Kramer, Abolition of exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area, Nederlands Internationaal Privaatrecht 2011, p. 633-641.

[7] The other two are the Evidence Regulation, No. 1206/2001, and the Service Regulation, No. 1393/2007.

[8] COM(2011) 126 of 16 March 2011; COM(2011) 127 of 16 March 2011.

to such measures (Protocol 21, TEU/TFEU). The Rome III Regulation is the first one based on enhanced co-operation, on the basis of Article 326-334 TFEU. It currently applies to fifteen Member States.

Additionally, certain sectorial directives contain incidental conflict-of-law rules or scope rules affecting private international rules. There are two directives in place to support judicial co-operation, concerning legal aid (2002/8/EC) and mediation (2008/52/EC). The case law of the Court of Justice of the European Union (CJEU) is also important for the development of EU private international law, and it adds to the framework through interpretation. Particularly important in this regard is the rich case law on Union citizenship and on freedom of movement.[9] This case law has had a significant impact on national private international law rules in the area of family law, the law of persons, and corporate law – areas that are not regulated by EU private international law rules.

2.3 Identifying the gaps

In the report underlying this briefing note, the gaps have been identified in two ways. Firstly, by analysing the territorial and substantive scope, and by specific exclusions of the regulations mentioned in the previous sub section. In this analysis, the coverage of various international conventions within the EU Member States was also considered. These are primarily conventions of the Hague Conference, notably the 1980 Hague Child Abduction Convention, the 1996 Convention on the Protection of Children, and the 2007 Hague Protocol on the Law Applicable to Maintenance Obligations. Secondly, a systematic analysis of private international law was carried out. This was done on the basis of text books from different jurisdictions, existing recent national codifications, notably from The Netherlands, Belgium, and Poland, and, to a degree, the work of the Hague Conference.

Gaps in the existing regulatory framework could be identified in respect of the following: the territorial scope of Brussels I; a lack of co-ordination between Brussels I and the Insolvency Regulation; status and legal capacity; arbitration; interference by residual national jurisdiction rules, most notably in Brussels IIbis; the exception for negotiable instruments in Rome I and Rome II; nuclear damage; the application of foreign law; the law of property; trust; agency; marriage; interspousal relationships; corporations; the names of natural persons; adoption; arbitration; parentage; and non-marital registered partnerships, as well as the protection of adults.

These gaps should be divided into three types, as a consequence of (1) the willed territorial limitation of EU legislation; (2) the deliberate exclusion of certain topics for various reasons; and (3) the absence of legislation on specific topics. In addition, there may be gaps as a result of the use of open notions, such as 'habitual residence' for natural persons. However, these are considered to be matters of interpretation, and can be left to case law or legal writing.

An example of the first type of gap is the general limitation of the Brussels I Regulation to defendants having domicile in an EU Member State. This limitation has been debated in the context of the Recast of this Regulation, and the Commission proposed to extend the scope.[10] As a result of the co-decision procedure, and for various reasons, in the latest available text the current limitation is largely retained.[11] In a similar manner, the

[9] See for an overview M. Bodan, *Concise Introduction to EU Private International Law* 2012, p. 19-28.

[10] COM (2010) 748 final of 14 December 2010.

[11] See Doc. no. 10609/12 (JUSTCIV 209, CODEC 1495) of 1 June 2012.

jurisdiction rules of the Maintenance Regulation and of Brussels IIbis are limited. The rules on recognition and enforcement included in the framework are generally limited to 'inter-EU' situations. The deliberate gaps as mentioned under (2) are the result of the existence of specific conventions or EU rules (*e.g.* arbitration agreements and specific insurance contracts under Rome I; nuclear damage under Rome II), or in an incidental case the inability to reach a political compromise (violation of privacy rights under Rome II).[12] The legislative concern should focus on the third category, the systematic gaps. These involve generally accepted topics and problems of private international law that are currently not regulated by union instruments. These will be addressed separately in the next section.

[12] In both Rome I and Rome II, negotiable instruments, as far as these obligations arise of out of their negotiable character, are also excluded.

3. GAPS AND REQUIRED ADDITIONS TO THE FRAMEWORK

3.1 Systematic Gaps and Required Additions

Based on the analysis of the various gaps, the systematic gaps are the topics that fall systematically outside those of the existing instruments. These gaps are regarded as required additions to the framework, since there is no EU rule that can be applied. This absence of harmonised rules has an immediate effect on citizens and businesses within the EU. The most important gaps and required additions that have been identified in the area of the law of obligations concern:

- Property;
- Trusts;
- Agency;
- Corporations.

In the area of family law, including the law of person, these gaps and required additions concern:

- Marriage;
- Registered partnerships and similar institutions;
- Names of natural persons;
- Adoption;
- Parentage;
- Protection of adults;
- Status and capacity of natural persons in general.

Gaps in the area of non-family law relate primarily to the applicable law, in view of the wide coverage of the Brussels I Regulation. It must be noted that some areas in the past have proven difficult to regulate either at a worldwide or at a regional level; this is particularly true for corporations and property.[13] At the same time, in the EU, the case law of the CJEU concerning the right to freedom of movement has had a significant influence on corporate law. Private international law rules were not addressed specifically in this case law, but the time may be ripe to do so. It is suggested that for the topics of trusts and agency, reference may be made to the existing Hague Conventions, though a limited number of EU Member States have signed these.[14] In any case, collaboration with the Hague Conference is desirable, as was done in the context of the Maintenance Regulation.

In the area of family law, the gaps relate to each of the three core issues of private international law, since these matters are excluded from Brussels I and, in addition, are not covered by the specific family law regulations, such as Brussels IIbis. Also in these areas, the case law of freedom of movement and union citizenship has already influenced domestic private international law rules: for example, in the area of name law, particularly the right to a double-barrelled surname composed of the surnames of both the father and the mother in cases of dual nationality or residence in a country where this is not allowed.[15] Insofar as areas are already covered by conventions of the Hague Conference for some or

[13] For trusts, the problem seems primarily to be a lack of interest, since the trust is a typical common law figure.

[14] See the 1978 Convention on the Law Applicable to Agency, and the 1985 Convention on the Law Applicable to Trusts and on their Recognition.

[15] CJEU 2 October 2003, Case C-148/02, ECR I-11613 (*Garcia Avello*); CJEU 14 October 2008, Case C-353/06, ECR I-07639 (*Grunkin Paul*).

most of the Member States, such as is particularly the case for inter-country adoption, a close collaboration with the Hague Conference is desirable.[16]

Arbitration is excluded from the scope of current instruments, in view of the extensive ratification (including all the Member States) of the 1958 New York Convention on Arbitration. However, this Convention only regulates a limited number of topics. It is suggested that in order to enhance the attractiveness of arbitration within the EU, a more comprehensive legal regulation of arbitration may be considered.

Another possible systematic gap in the framework is collective redress. The use of collective mechanisms is increasing in Europe, and Member States have recently enacted various types of collective redress. The question is whether the existing EU framework, in particular the Regulations Brussels I, Rome I, and Rome II, is adequate to address the particularities of collective redress. This problem was the subject of several (unsuccessful) specific EU initiatives, and of a broad public consultation in 2011.[17]

3.2 The Issue of Recurring Rules

A brief remark should be made here on the co-existence of mostly topic-specific regulations. This may result in incoherence, though more recently coherence is addressed specifically in the legislative process. This co-existence also results in a recurrence of rules relating to general issues of private international law, such as public policy, mandatory rules, and *renvoi*. Such rules on general problems of private international law are always contained in an instrument that deals with a specific issue of private international law: for instance, contract law. This contrasts with the approach in some national codifications, which contain separate provisions dealing with these general problems that are accordingly applicable in all cases.

[16] See the 1993 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Reference may also be made to the 1978 Convention on Celebration and Recognition of the Validity of Marriages, though only two Member States (and one third country) have ratified this Convention.

[17] Commission Staff Working Document, Public Consultation: Towards a Coherent European Approach to Collective Redress, SEC(2011) 173 final of 4 February 2011.

4. OPTIONS FOR FURTHER LEGISLATION

4.1 The Role of the EU Legislature

In principle, the legal basis of Article 67 in conjunction with Article 81 TFEU on judicial cooperation in civil matters covers the full ambit of private law topics and private international law questions. In the area of the law of obligations, the ordinary legislative procedure applies. To date, the enactment of specific regulations in this area has not been problematic, though in incidental cases compromises on specific provisions have been hard to reach.[18]

As was pointed out in Section 2, in principle, matters in relation to family law require unanimity, which makes the legislative process inherently more difficult. This is especially the case because in this area the substantive laws in the Member States diverge. Same-sex marriage and the alternatives to marriage provide obvious examples. As the EU does not have exclusive competence in the area of judicial co-operation in civil matters, it must respect the principle of subsidiarity, which is a control mechanism in the hands of the Member States. The Protocol on proportionality and subsidiarity opens the possibility for national parliaments to issue a reasoned opinion that proposed EU legislation does not respect these principles. Reference can be made to the resolution of the Polish Parliaments' Lower Chamber that the Commission's proposal on the registered partnerships (COM/2011/0127 final) breaches the subsidiarity principle.

4.2 Expansion of the Framework – *Ad hoc* v. Structured

The current legislative technic can be qualified as *ad hoc*, since separate regulations are established per topic. For the short and mid term, it is suggested to continue on this path of enacting separate instruments, by way of 'gap filling' to complete the framework. This technic has proven fruitful until now, and it is also favoured in view of the required expertise on the substance of the matter to be regulated (*e.g.* corporate law or the law regarding names). From the perspective of the internal market, and in view of the special legislative procedure for family law, it is advisable to prioritise measures in the area of the law of obligations. In the area of family law, in the event that the special legislative procedure does not succeed, the procedure of enhanced co-operation may be the only feasible option, although, as will be pointed out in the next subsection, this technic does have its disadvantages.

In the longer term, a more structured approach may be tried in order to avoid private international law being dispersed over many different instruments, in addition to recurrent provisions and possible incoherence. A first step could be a merging of the Rome I and II Regulations on contractual and non-contractual obligations into a single instrument. The same technic can be used for other instruments as well, though this is problematic. A novel approach is the bringing about of a genuine EU framework within the meaning of a code. However, this may trigger fundamental debates, and is – at least for the near future – not the most feasible option. This issue will be discussed further in Section 5.

[18] In the case of privacy and other personality rights, this has resulted in the exclusion from Rome II. See in this regard the Motion for a European Parliament Resolution to amend the Regulation, Report of 2 May 2012.

4.3 The Use of Enhanced Cooperation (Family Law)

As was concluded above, most gaps occur in the area of family law, and in this area the special legislative procedure may prove further legislation difficult. This was also experienced in the bringing about of rules on the applicable law to divorce and legal separation, the Rome III Regulation. For the first time, the required unanimity could not be reached and the procedure of enhanced cooperation was chosen. The decision on the basis of Article 329(2) TFEU to make use of enhanced cooperation is seen as an option of last resort, to be taken only when the targets to be pursued by the co-operation cannot be met by the EU as a whole within a reasonable time. In the case of Rome III (applicable since 21 June 2012), nine Member States submitted the request for this procedure, and fifteen Member States eventually decided to participate.

An obvious advantage is that this procedure enables the reaching of policy targets that would otherwise be impossible. In the case of Rome III, at least more than half of the Member States have now harmonised rules on the law applicable to divorce. Outside the private international law area, the Rome III example was meanwhile followed to create the long-desired unitary patent.[19] However, this technic also has its disadvantages; in the literature, it has rightfully been pointed out that the technic results in a two-speed Europe.[20] In the case of Rome III, it accentuated the rift between the Member States. It is submitted that for a selected topic, the 'agreement to disagree' is regrettable, but does not impair the status quo. This is particularly so in the case of Rome III, where its effects are diminished by the jurisdiction and recognition rules of Brussels IIbis. However, if the enhanced cooperation process were to be utilised more often, it may further fragmentise the EU framework on private international law, far beyond the non- or limited participation of Denmark, the United Kingdom, and Ireland. In particular, enhanced cooperation may increase the phenomenon of 'forum shopping' within the EU, where litigants may try to escape the applicability of certain conflict rules.

[19] Council Decision 2011/167/EU.

[20] K. Boele-Woelki, To be, or not to be: enhanced cooperation in international divorce law within the Euopean Union, Victoria University Wellington Law Review 2008-2009, p. 779-792 (at 791). See in general for a discussion (of disadvantages) Bordignon/Brusco: On Enhanced Cooperation, Journal of Public Economics 2006, p. 2063–2090.

5. TOWARDS A CODE OF PRIVATE INTERNATIONAL LAW?

5.1 Possible Advantages of a Comprehensive Codification

An explicit question in the study requested by the European Parliament concerned the possibilities for a code of private international law. This first raises the question as to what is to be understood by a 'code' or codification. Particularly in a Union with 27 Member States, including common law countries and mixed systems, its meaning may not be immediately understood or appreciated. It should be pointed out that codification in the EU context is different from what is traditionally understood by it in civil law countries. In the Interinstitutional Agreement of 1994,[21] it is described as 'the procedure for repealing the acts to be codified and replacing them with a single act containing no substantive change to those acts'. In the EU context, the literature has distinguished four different types of codification: (a) the classic 'big' codification, the drafting of a codex; (b) pure codification ('codification without any amendment of existing law'); (c) corrective codification; and (d) codification with recast, in which some extra elements are added to the original or pre-existing acts.[22] These different meanings should be borne in mind when discussing a codification or code of European private international law.

If codification is to be understood within the meaning of the Interinstitutional Agreement of 1994, it will mean the merging of the existing instruments into one single instrument, without changing the substance. An important facet of codification at the EU level is the reduction in the volume of legislation. As has been pointed out above, the merging of Rome I and II is likely to result in few difficulties. For the other instruments, merging might be more difficult due to their distinct scope and subject matters. Since not all substantive gaps have been filled, and general rules on private international law are lacking (*e.g.* on the application of foreign law), codification or establishing a 'code' in the near future will evidently entail more than a mere consolidation of instruments.

In civil law countries, the prevailing idea of a code is that it will help the systematisation of law. However, in the EU context it must be pointed out that this idea is not in all instances shared by common law jurisdictions. An advantage of a code could be that recurring general provisions on *inter alia* public policy, overriding mandatory provisions, and *renvoi* would be avoided. However, for example the rules on overriding mandatory rules, known from Rome I and Rome II, do not occur in all regulations, and are not even the same in the two regulations mentioned.

Another possible advantage is that a code will benefit potential stakeholders, including EU citizens, EU institutions, and in general courts, legal practitioners, and public officers. It is submitted that a single instrument or code will indeed increase transparency and, consequently, the accessibility of EU law. However, at the same time it is clear that questions relating to private international law often arise on a very specific topic. For example, a company that wishes to conduct business abroad will be interested primarily in contract law and maybe corporate law, but not in all the other topics involving private international law. This leaves unimpeded the fact that filling the current gaps and in general achieving a coherent set of private international law rules are very important for every

[21] Accelerated working method for official codification of legislative texts, Interinstitutional agreement of 20 December 1994, 96/C 102/02.

[22] W.J.M. Voermans, C.P. Moll, N.A. Florijn & P.J.P.M. van Lochem, 'Codification and consolidation in Europe as means to untie red tape', Statute Law Review 2008, p. 65-81 (at 79-80).

stakeholder. Clarity on the content of the private international law rules will remove obstacles for businesses and consumers to enter into cross-border transactions. Certainty on the rules will also lead to cost reductions for courts having to deal with cross-border litigation and for the parties involved.

5.2 Gradual Harmonisation or Simultaneous Adoption

In adopting a more comprehensive codification or European code, the choice could be either gradual harmonisation or simultaneous adoption. In the study, experiences in the recent adoption of private international law codes in the Netherlands, Belgium, and Poland were examined. The Netherlands opted for gradual harmonisation; hence, separate conflict of law acts were adopted on a step-by-step basis over a period of more than 25 years. These were – with few amendments – merged into a single act, and completed with 17 general provisions. In Belgium and Poland, a code was adopted simultaneously. In Belgium, the code was the result of legal research and comparative analyses, whereby thematic consistency was considered an important aim. In the case of Poland, the code was intended to modernise and complete an old private international law code, and to bring it into line with EU rules.

If a code is to be favoured, the best way forward for the EU is to continue on the path of gradual adoption of instruments devoted to specific topics, as was discussed above in the context of filling the gaps (Section 4.2). This will smoothen the legislative process and increase the chance of unanimity where required. It is important to include specialists both in private international law and in the subject matter involved. Further, coherence with pre-existing instruments should be enhanced and preserved. In the long term, once the gaps have been filled, and general concepts European private international law have evolved, the consolidation into a more comprehensive framework or code would be an option.

5.3 Is a Code Achievable?

The academic debate in some Member States, notably France and Germany, is largely in favour of the creation of a code on private international law. Conferences and publications in France and Germany demonstrate that many scholars in these countries believe that steps should be taken in the direction of a code.[23] Professor Paul Lagarde has published an academic draft for the general provisions of such a code.[24] However, these views are not shared by all private international law scholars or by national legislators.

The expert meeting for the purpose of this research revealed that among these experts there was no unanimity on the necessity or feasibility of a code. The prevailing idea was that it was doubtful that all the Member States would accept such an idea quickly. Furthermore, approaches appeared possible that would lead to a result sooner than others, without excluding comprehensive codification as a long-term option. It was also thought that the recommendations should be seen as a road map rather than a detailed guide. In the course of the discussion, the prevailing sentiment was that the best way forward would

[23] See in particular M. Fallon, P. Lagarde & S. Poillot Peruzzetto (eds.), Quelle architecture pour un code européen de droit international privé?, Peter Lang, 2011; S. Leible & Hannes Unberath (eds.), Brauchen wir eine Rom 0-Verordnung? Überlegungen zu einem Allgemeinen Teil des europäischen IPR, Jena 2013. Thanks are owed to Prof. Dr Stefan Leible for providing contributions to the forthcoming book. See further E. Kieninger, Dat Europäische IPR vor der Kodifikation? In: Festschrift Von Hoffmann, Grenzen überwinden – Prinzipien bewahren, 2012, p. 184-197; M. Czepelak, Would we like to have a European Code of Private International Law?, European Review of Private Law 2010, p. 705-728.

[24] P. Lagarde, Embryon de Règlement portant Code europeén de droit international privé, RabelsZ 2011, p. 673. See also the activities of the academic group *Groupe européen de droit international privé* (GEDIP) at http://www.gedip-egpil.eu.

be through the further development of instruments concerned with isolated issues of private international law. Although it was recognised that questions existed in respect of general principles of private international law that would be similar for some instruments, a final decision on codifying these general principles might better be taken once the necessary separate instruments have been completed. The codification, if this were widely supported by the Member States, might be undertaken more efficiently once the separate instruments, gaps, and general principles have been dealt with.

In this regard, it also important to emphasise that pushing forward the idea of a code over a short period might lead to more fragmentation as a result of the position of certain Member States and the use of enhanced cooperation in the absence of unanimity where required. With regard to more recent regulations, the United Kingdom and Ireland have decided not to opt in, and Rome III only applies to a limited number of Member States. This should be taken into account in policy making and legislative activities.

6. CONCLUSIONS AND RECOMMENDATIONS

The identified systematic gaps and required additions primarily relate to Property; Trusts; Agency; Corporations (law of obligations) and Marriage; Registered partnerships and similar institutions; Names of natural persons; Adoption; Parentage; Protection of adults; Status; and the capacity of natural persons in general (family law).

For the short and the mid term, it is recommended to continue on the path of gradual rather than simultaneous adoption. This means filling gaps by using separate instruments, while preserving coherence between the individual instruments. Though the idea of a European private international law code is attractive for various reasons, the political reality is that it seems it will be difficult to obtain sufficient support in the near future. The diverging views on general concepts of private international law (*e.g.* the role of overriding mandatory law and the application of foreign law) and the differences in the substantive law (*e.g.* in the area of registered partnerships, same-sex marriages, and names) are likely to raise numerous obstacles. In this regard, it should be pointed out that the special position held by the United Kingdom, Ireland, and Denmark has already resulted in territorial fragmentation, and it can be expected that, at present, proposals for a code will not improve this status.

In the completion of the framework, for feasibility reasons, the non-family issues can be prioritised, followed by the family law area. It is considered that in the non-family area, Rome I and II could be the subject of further codification, in the sense of replacing them by a single act. In view of the special legislative procedure for family law measures, in the absence of unanimity, the procedure of enhanced cooperation is an option. An advantage is that policy goals to establish an instrument can be achieved. An evident disadvantage is that it results in a 'two-speed Europe' that accentuates the different views in the Member States. It is doubted whether the advantages outweigh the disadvantages.

In the long term, once the gaps have been filled, and the general concepts of private international law are further developed in a European context, a more comprehensive private international law framework or 'code' can be considered.

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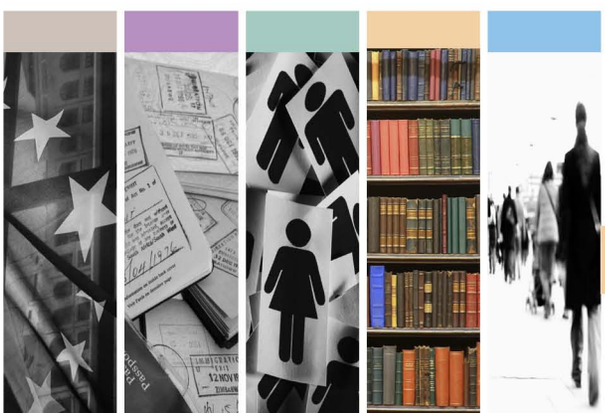

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