



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

Constitutional Affairs

Justice, Freedom and Security

Gender Equality

Legal and Parliamentary Affairs

Petitions



**A European Framework
for private international
law: current gaps and
future perspectives**

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZEN'S RIGHTS AND
CONSTITUTIONAL AFFAIRS**

LEGAL AFFAIRS

A European Framework for private international law: current gaps and future perspectives

STUDY

Abstract

This report identifies the gaps that exist in the current European framework of private international law and suggests a road map towards a more comprehensive codification of EU private international law. For the time being, legislative efforts should be directed at creating separate instruments for well-defined problems of private international law. The fruits of these efforts could in the long-term be combined in a code of EU private international law.

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

AUTHORS

Prof. Dr. Xandra Kramer (scientific director)
Mr Michiel de Rooij, LL.M. (project leader)
Dr. Vesna Lazić
Dr. Richard Blauwhoff
Ms Lisette Frohn, LL.M.

RESPONSIBLE ADMINISTRATOR

Ms Vesna Naglič
Policy Department C – Citizens' Rights and Constitutional Affairs
European Parliament
B – 1047 Brussels
E-mail: vesna.naglic@europarl.europa.eu

LINGUISTIC VERSION

Original: EN
Translation: DE/FR

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

European Parliament, manuscript completed in November 2012

© European Union, 2012

This document is available on the Internet at:

<http://www.europarl.europa.eu/studies>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorized, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

LIST OF ABBREVIATIONS	6
EXECUTIVE SUMMARY	7
INTRODUCTION	12
PART I: CURRENT GAPS AND FUTURE PERSPECTIVES	15
1. THE EXISTING GAPS IN THE EUROPEAN FRAMEWORK OF PRIVATE INTERNATIONAL LAW	17
1.1. The contents of the current framework	17
1.2. The legislative framework in force	17
1.2.1. Regulations	17
1.2.2. Regulations expected in the near future	19
1.2.3. EU-Regulations and specific Hague Conventions	19
1.2.4. Directives	20
1.2.5. Other relevant EU legislation	20
1.3. Exceptions to the scope of the EU Regulations	21
1.3.1. Brussels I Regulation (No. 44/2001)	21
1.3.2. Regulation Brussels II-bis (No. 2201/2003)	25
1.3.3. Regulation Rome I (No. 593/2008)	28
1.3.4. Regulation Rome II (No. 864/2007)	31
1.3.5. Maintenance Regulation (No. 4/2009)	32
1.3.6. Regulation Rome III (No. 1259/2010)	33
1.3.7. The Insolvency Regulation (No. 1346/2000)	34
1.3.8. European Enforcement Order Regulation (No. 805/2004)	36
1.3.9. European Payment Order Regulation (No. 1896/2006)	36
1.3.10. European Small Claims Procedure Regulation (No. 861/2007)	37
1.3.11. The Succession Regulation	38
1.4. Exception to the scope of relevant Hague Conventions	39
1.5. Citizenship of the Union	39
1.5.1. ECJ case law relevant for (cross) border private law issues	39
1.5.2. Other areas of European private international law connected to Union citizenship	43
1.6. The systematic structure of private international law	46
1.6.1. The traditional analysis of private international law	46
1.7. Gaps that exist within the framework	48
1.7.1. Gaps identified on the basis of the scope of the current framework	48
1.7.2. Gaps identified on the basis of the systematic structure of private international law	49
1.7.3. Concluding remarks with respect to the gaps	51

2. ADDITIONS THAT ARE NEEDED TO THE CURRENT FRAMEWORK, NOW AND IN THE FUTURE	53
2.1. Additions required in view of the genuine European area of justice	53
2.1.1. Articles 67 and 81, TFEU	53
2.1.2. The Tampere 1999, The Hague 2004 and Stockholm 2009 programmes	54
2.2. Private international law on the national level	55
2.2.1. PIL is also a phenomenon of national law	55
2.2.2. The situation in the Member States	55
2.3. A brief comparison of three recent codifications: Belgium, the Netherlands and Poland	58
2.3.1. The Belgian Code of Private International Law 2004	58
2.3.2. Book 10 Dutch Civil Code	59
2.3.3. The Polish Act of February 4, 2011 on Private International law	60
2.3.4. The subject matter in more detail	61
2.3.5. The rationale behind the national codification	63
2.4. Developments in internal substantive law that influence PIL	64
2.5. Gaps in the European framework and the contents of national PIL law	65
2.5.1. Comparison between the framework and the national codifications	65
2.5.2. Developments in internal law not identified in the framework	66
2.6. The gaps that can be identified	66
2.6.1. The territorial scope of the rule	66
2.6.2. Systematic gaps	67
2.6.3. Deliberate gaps	67
2.6.4. Notions open to interpretation found in the framework	68
2.7. Additions to the framework	69
3. THE ROLE OF THE EU LEGISLATURE	70
3.1. The options that are in general open to the EU legislature in respect of PIL	70
3.1.1. The legal basis of EU legislation on PIL	70
3.1.2. EU PIL legislation as a replacement of national PIL	70
3.1.3. EU PIL legislation and the relation to international PIL instruments	71
3.1.4. Further legislation by specialised instruments or restructuring through codification	71
3.1.5. The impact of harmonisation or unification of substantive law by the EU	72
3.2. Expansion of the existing EU legislation	73
3.2.1. Pressing issues in the additions identified	73
3.2.2. A code on private international law as a novel option	73
PART II: EXTENDING THE FRAMEWORK TO A CODE	74
4. CONTRIBUTIONS AND ADVANTAGES FOR THE STAKEHOLDERS	74
4.1. Which stakeholders can be identified?	74

4.2. Contributions and advantages that can be identified	77
4.2.1. Facilitation of cross-border transactions, reduction of costs, acceleration of legal proceedings	77
4.2.2. Other contributions and advantages	77
5. THE CONTRIBUTIONS AND ADVANTAGES OF A COMPREHENSIVE CODIFICATION (A CODE)	79
5.1. The difference between a code and separate legal instruments	79
5.1.1. What is understood by a 'code'?	79
5.1.2. Benefits traditionally attributed to a 'code'	80
5.1.3. The current overlaps between the existing instruments in the framework	80
5.1.4. Whether these current overlaps will also be relevant for the proposed additions	81
5.1.5. Contributions and advantages of a code for the stakeholders	81
6. THE APPROACH FOR A CODE – GRADUAL HARMONISATION OR SIMULTANEOUS ADOPTION	83
6.1. Experiences from various member states	83
6.1.1. The Netherlands (gradual adoption)	83
6.1.2. Belgium (simultaneous adoption)	83
6.1.3. Poland (simultaneous adoption)	83
6.1.4. Critical analysis of gradual harmonisation as opposed to simultaneous adoption	83
6.2. The most suitable solution in view of the EU perspective	84
6.2.1. What must be taken into account?	84
7. WHETHER A CODE IS ACHIEVABLE AND THE USE OF ENHANCED CO-OPERATION	86
7.1. A PIL code and the need for supporting national legislation	86
7.2. The use of enhanced co-operation	86
8. SUGGESTED STRUCTURE FOR A CODE, GENERAL PRINCIPLES AND RELEVANT ISSUES	89
8.1. The most suitable legislative instrument for a code	89
8.2. The preferred structure for a code	89
8.3. Basic agreement on the contents of EU PIL legislation	90
CONCLUSIONS	92
REFERENCES	94

LIST OF ABBREVIATIONS

Art.	Article
CISG	United Nations Convention On Contracts For The International Sale Of Goods, 1980 (CISG)
CJEU	Court of Justice of the European Union
CMR	Convention on the Contract for the International Carriage of Goods by Road (CMR) - (Geneva, 19 May 1956)
ECJ	European Court of Justice
ECR	European Court Reports
EEC	European Economic Community
EGBGB	Introductory Act to the German Civil Code
ERPL/REDP	European Review Public Law / Revue Européenne de Droit Public
EU	European Union
EWCA	Court of Appeal of England and Wales
EWHC	High Court of England and Wales
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
No.	Number
NL CC	Netherlands Civil Code
NL CCP	Netherlands Code of Civil Procedure
NtER	Nederlands Tijdschrift voor Europees Recht
OJ	Official Journal
PIL	Private international law
PPIL	Polish Private International Law Act
TCN	Third Country National
TCNs	Third Country Nationals
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
ZEuP	Zeitschrift für Europäisches Privatrecht

EXECUTIVE SUMMARY

This report aims to identify the existing gaps in the current framework of private international law in the EU, and to study where additions to this framework are required. It further addresses the question whether a more comprehensive codification of private international law in the EU is needed and, if so, how this can be achieved.

The term 'framework of private international law' covers all EU instruments in force that relate to the problem of jurisdiction, applicable law and the recognition and enforcement of foreign judgments and authentic instruments. The research does not include other areas of judicial co-operation that are sometimes covered by the term private international law, such as the cross-border service of documents, the taking of evidence and legal aid in cross-border cases.

Private international law traditionally was, and for a part still is, an issue of national law. Each state has its own rules to deal with jurisdiction, applicable law and recognition and enforcement of foreign judgments. Europe has taken an interest in issues of private international law since the 1957 Treaty on the European Economic Community. The 1997 Amsterdam Treaty introduced the wider concept of judicial co-operation and brought the three core issues of private international law into the scope of the European Community. The three core issues are now found in Article 81(2)(a) and (c), TFEU. Private international law in principle deals with the cross-border aspects of all questions of private law. However, an important consideration is that the adoption of EU legislation on a private international law matter concerning family law requires unanimous action of the Council, after consultation of the European Parliament (Article 81(3), TFEU).

Thirteen regulations have been adopted that are relevant for the European framework of private international law. The identification of potential gaps in the current framework was carried out primarily with reference to the provisions on the substantive (material) and territorial scope of application, as well as to the relevant ECJ case law concerning the application and interpretation of such provisions. The report discusses the regulations in force with a view to identifying the gaps. The report further discusses the impact of the case law of the CJEU on the citizenship of the Union dealing with cross-border private law issues, as this case law as well may point to gaps that need to be addressed by the framework. This case law is important for EU private international law, but is not reflected in the current regulatory framework.

The analysis of private international law is characterised by a structured approach, developed in legal theory. Although national private international law systems differ, the main elements of this approach have found acceptance in most Member States. The structure of the traditional analysis of private international law is also found in the achievements of the Hague Conference. Conventions of the Hague Conference typically deal with a specific problem identified through this analysis.

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 II-bis; 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; interpersonal relationships; corporations; the name of natural persons; adoption; arbitration; parentage; non-marital registered partnerships, as well as the protection of adults.

Harmonisation and codification of private international law in the EU must be assessed within the policy objective to create and maintain a genuine area of justice. The current

Stockholm Programme (2009) focuses on issues, such as further strengthening of the principle of mutual trust and promoting citizens’ rights, particularly through strengthening human rights and promoting the full exercise of the right of free movement that can be supported through measures on private international law.

The report also discusses the codification of private international law at the national level. The content of recent national codifications may help to identify gaps in the current EU framework. The motives for national legislatures to codify private international law may also be relevant for the EU legislature. A brief comparison is made of three recent codifications: Belgium, the Netherlands and Poland. The Belgian codification contains rules on jurisdiction as well as on enforcement and recognition, while the Dutch and Polish legislatures decided to limit the PIL legislation to choice of law rules. A typical feature of national codifications of private international law is that they may contain rules on principles of private international law, or general provisions of private international law. The motives for codification vary, from a wish to enhance transparency and to make rules adopting an open and international approach, to a desire to make the rules more easily accessible to legal practitioners.

Private international law is also influenced by developments within the internal (national) systems of private law. New rules of private international law will be necessary to deal with new legal institutions of the national systems, such as the non-marital registered partnerships. Another way in which developments in substantive law can change private international law is that values, considered important on the national level, find their way into private international law. The private international law rules that afford extra protection to employees and consumers serve as an example of this process.

The gaps in the current framework can be divided into three main categories. Firstly, gaps which are the willed result of territorial limitations to the scope of the EU legislation. Secondly, systematic gaps occur when the current framework is compared to the separate problems that when taken together comprise the traditional problems of private international law. The current framework regulates most of these separate problems, but not all of them. Thirdly and finally, there are gaps when EU legislation provides that certain questions are deliberately omitted from the scope of a union instrument, although from the systematic perspective these questions form part of the issue regulated in the instrument, e.g. contractual obligations. In addition to these three main categories it should be pointed out that as a consequence of various factors, the community instrument may contain rules that refer to notions which by their nature are open to interpretation. For the time being these open notions are better left to case law or legal writing to determine their meaning.

The truly necessary additions would address the gaps that have been designated as ‘systematic’ gaps, as there is no rule that can be applied. The absence of harmonised or unified rules has immediate effect on the citizens and businesses with the EU.

In the general area of the law of obligations, these ‘systematic’ gaps are:

- Property law
- Trusts
- Agency
- Corporations
- Arbitration

In the area of family law these gaps are:

- Marriage
- Registered partnerships and similar institutions
- Name of natural persons
- Adoption
- Parentage

- Protection of Adults
- Status and capacity of natural persons in general

The replacement of national private international law by EU instruments is already manifesting the subject-matters covered by the Regulations Rome I and Rome II. For various reasons these instruments have made national private international law rules superfluous. The Brussels I Regulation also exerts a strong influence outside its sphere of application. National rules on jurisdiction appear to be influenced by Brussels I. In the area of family law the 'replacement' of national private international law by EU rules is less manifest.

The relationship between EU legislation and global private international law instruments can be discussed from various perspectives. The most recent phenomenon is the interaction between the EU PIL legislation and the international PIL instrument, demonstrated by the Maintenance Regulation and the Hague Protocol 2007. The EU PIL instruments and the international PIL instruments are to be regarded as combined, rather than alternative or competing instruments.

In some Member States, the academic debate appears to be in favour of the creation of a private international law code. However, in other Member States this is not the case, and the political reality – also with a view to the limited participation of the UK, Ireland and Denmark - is that it will be hard to obtain sufficient support in the near future. The view developed in this report is that the best way forward in the short term would be through the further development of instruments concerned with isolated issues of private international law. Although it was recognised that there were questions in respect of general principles of private international law that would be similar for some instruments, a final decision on codifying these general principles could better be taken once the necessary separate instruments will have been completed. An argument in favour of continuing with separate instruments is that the law is increasingly becoming the work of specialists. The experience with the Hague Protocol could serve as example for steps to modernise several Hague Conventions that coincide with gaps in the current EU framework.

The 'gaps' in the area of non-family law are mainly in the field of applicable law. Measures in respect of non-family law should be prioritised, in view of their relevance for the Internal Market and in view of the requirement of unanimity fundamental to the EU legislative procedure in the area of family law. In principle a special legislative procedure requiring unanimity will have to be followed in the area of family law. On the basis of the '*passerelle*' clause of Article 81(3) TFEU the Council, acting unanimously and after consultation of the Parliament, could decide to follow the ordinary legislative procedure in respect of a clearly determined aspect of family law (as an example: protection of adults). Such a decision will not be adopted when it is opposed by national Parliaments.

In respect of family law, if unanimity cannot be reached, the conclusion could well be that the only way forward left open is through enhanced co-operation (following in the footsteps of the Rome III Regulation). It is doubtful that enhanced co-operation is an attractive solution in the event of deadlock. When weighing the pros and cons of enhanced co-operation in the area of private international law, it is difficult to conclude that the pros outweigh the cons. The consequence of enhanced cooperation will be that within the Union there will be two groups of states; those who take part in the co-operation and those who do not. For a selected topic, the 'agreement to disagree' is regrettable, but does not impair the *status quo*. However, if the enhanced co-operation process were to be utilised more often, rather than for a selected problem, such action may risk the existing *status quo*. In particular, enhanced cooperation may increase the phenomenon of 'forum shopping' within the EU.

EU nationals and EU residents, natural or legal persons residing in the EU would be the prime stakeholders of private international law legislation. The situation of businesses active

in the EU is in principle similar to that of EU residents. The relevance of legislation on private international law is increased by the Internal Market, which has amplified and will further improve cross-border commercial activities. Legislation on private international law on the European level increases legal certainty and helps to remove differences in treatment that are a consequence of national laws.

The benefit for the EU institutions of an eventual code is not immediately evident. Preparing additions to the current framework law will place an extra burden on the EU institutions, most notably the Commission and Parliament. The position of the CJEU or its ‘stake’ in a future code on private international law cannot be dissociated from the general discussion on the caseload of the CJEU, and the possible solutions to remedy this situation. Incidentally, legal doctrine has taken the position that the legal profession would be the prime stakeholder of a codification, as this would ease the task of the ordinary lawyer.

Clarity on the content of the private international law rules will remove obstacles for businesses and consumers to enter into cross-border transactions. Removing obstacles would in principle also lead to some cost reduction and would in principle speed up legal proceedings. True cost reductions may yet to be made in the future, once courts and practitioners have become more acquainted with the current and future framework. The true cost reduction in the short term could be with respect to increased legal certainty for parties, citizens and businesses, who can anticipate on the consequences of these rules.

For the contributions and advantages of further additions to the European framework of private international law, reference can be made to the 1999 Tampere Conclusions stating that in a genuine European area of justice, individuals and businesses should not be prevented or discouraged from exercising their rights. Moreover, the focus of the 2009 Stockholm Programme seeking to promote, *inter alia*, the full exercise of the right of free movement should also be mentioned in this context. When the citizens of Europe increasingly make use of their right of free movement, it is expected that they will increasingly derive rights (or obligations) from a legal relation that has an international character. Furthermore, rights derived from a legal relationship that always had a purely national character, may have to be assessed in another Member State when the parties to the legal relationship make use of their free movement rights. The typical example is the British couple who move to Spain for their retirement after 40 years of married life in the United Kingdom. From that moment forwards, Spanish courts and authorities may have to deal with arrangements this couple once made in the United Kingdom in respect of matrimonial property or succession.

In the discussion on the codification of private international law, attention should be paid to the differences between the national and the European concept of ‘codification’. The meaning of the terms codification and consolidation differ considerably between the legal systems of the EU Member States. At the EU level codification in principle means the procedure whereby the acts to be codified are repealed and replaced by a single act containing no substantive change to those acts (Inter-institutional Agreement of 20th December 1994, point 1). An important facet of codification on the EU level is reduction of the volume of legislation.

There are indeed overlaps between, and recurring provisions in, the existing instruments. These overlaps are concentrated in rules of a general nature, which make use of traditional concepts in the general theory of private international law. A decision on the need to give these provisions their own place within the framework as general principles is better made after the ‘systematic’ gaps identified in this report have been filled.

Continuing a programme of gradual adoption is, therefore, to be favoured. The discussions on certain instruments should, to a certain extent, take place in consultation with the Hague Conference, with a view to modernising certain Hague Conventions, as has been achieved in respect of maintenance.

With respect to a possible working plan to fill the gaps, it would appear to be advisable to continue the approach that has been followed thus far, at least in the short term. New legislation should be developed for distinct areas of private international law, rather than a single instrument to cover the gaps. Any new legislation should, however, also ensure coherence with other pre-existing instruments. While working on such new legislation, the EU legislature could consider dividing its attention and efforts across three distinct areas of private international law that fall within the framework: civil procedure in civil and commercial cases in general (an area which is almost complete); choice of law (applicable law) in non-family law cases (raising issues that have a strong link with the Internal Market); private international law for family law cases (which will require unanimity in the Council). Directing its attention to these separate areas may aid the European legislature in making progress with completing the framework.

INTRODUCTION

Aim and scope of the report

The elaboration of this study was requested by the Committee on Legal Affairs of the European Parliament. It aims to identify the existing gaps in the current framework of private international law in the EU, and where additions to this framework are required. It further researches whether a more comprehensive codification is needed and, if so, how this can be achieved.

The term ‘framework of private international law’ covers all EU instruments in force that relate to the problem of jurisdiction, applicable law and recognition and enforcement of foreign judgments and authentic instruments. The research does not include other areas of judicial co-operation that are sometimes gathered by the term private international law. Notably it does not extend to questions regarding the cross-border service of documents, the taking of evidence and legal aid in cross-border cases.

Relevance of the report for EU policy

In the past decades, and particularly since the extended competence as a result of the entry into force of the Treaty of Amsterdam in 1999, an extensive framework of private international law instruments has been established. These instruments are relevant to support the proper functioning of the internal market and to accommodate the free movement within the EU. They are also important for the purpose of the establishment and the strengthening of a genuine area of justice (see in particular Article 67(3) and Article 81 TFEU). These instruments distribute jurisdiction between the EU Member States, provide certainty on the applicable law to cross-border legal relationships and guarantee the recognition and enforcement of foreign judgments within the EU. A first example is where companies seated in different Member States conclude a contract; in case of a dispute questions will arise as to in which court a claim for damage may be brought, which substantive law applies as well as if and how a judgment rendered in the courts of one of the Member States is recognised and can be enforced in the other Member States. A second example is a tortious conduct, such as the infringement of a personality right, for which a claim based on defamation is brought in the EU courts. A third category relates to the area of family law, including a marriage or divorce between nationals from different Member States and related questions on parental responsibility, maintenance, and matrimonial property.

In the first example, the contractual dispute, existing EU instruments (notably the Brussels I and the Rome I Regulations) provide the answers and sufficient legal certainty. However, particular disputes are excluded, for example contractual relations in the area of company law and trusts, bills of exchange as well as particular agency relationships. Some of these issues are regulated by international conventions, but not all Member States are party to these and these do not cover all areas. In the second example, for the applicable law, the current Rome II Regulation provides a broad framework, but it does not cover all non-contractual disputes, notably it excludes the infringement of personality rights. In the third example, the category of family law, existing EU-Regulations and pending proposals cover a large portion of the issues, but not all. Examples are the recognition of marriages; in particular marriages between same-sex partners or other forms of partnership (such as registered partnerships that exist in several Member States) may cause difficulties. It must be noted that family law is a more difficult policy area since Article 81(3) requires unanimity in the decision-making process. A proposal to regulate the applicable law to divorces failed. Meanwhile on the basis of enhanced co-operation the Rome III Regulation has been adopted to close the gap, but this only applies to fifteen of the Member States.

Several other areas of law are not at all part of the current EU private international law framework. Examples are the law of names, property law and corporate law. Through the free movement, the principle of non-discrimination and EU-citizenship, rulings of the CJEU have had an influence on private international law questions arising in these areas, but a coherent regulation does not exist. The recognition of civil status documents also still proves difficult in practice. This may create obstacles to the free movement and freedom of establishment.

The existing framework consists of a set of EU Regulations; several directives also include private international law provisions. The co-existence of these instruments sometimes leads to duplications of rules and may also make the accessibility and application of these instruments more difficult for EU-citizens, courts and practising lawyers.

Working methodology

This report is a collective work and has involved a number of mainly academic lawyers, all experts in the area of private international law, from across the EU. The actual writing of the report was primarily carried out by the authors, based in The Hague. The authors were drawn from the staff of the contractor, T.M.C. Asser Instituut, The Hague, the Netherlands (Dr Lazić and Mr de Rooij) and of the *International Juridisch Instituut* (International Legal Institute), The Hague, the Netherlands (Ms Frohn and Dr Blauwhoff). One of the authors (Mr De Rooij) also acted as project leader.

The report is prepared under the scientific directorship of Professor Dr Xandra Kramer of Erasmus Universiteit, Rotterdam, the Netherlands. Professor Kramer co-operated closely with the authors during the project and wrote parts of the report.

The study further involved a group of external experts from various Member States, representing various legal traditions. The external experts were (in alphabetical order): Prof. Dr Paul Beaumont (University of Aberdeen, United Kingdom), Dr Agnieszka Frackowiak-Adamska (University of Wroclaw, Poland), Prof. Dr Francisco Garcimartin Alférez (Universidad Autónoma of Madrid, Spain), Prof. Dr Jan von Hein (Universität Trier, Germany), Prof. Dr Miklos Kiraly (Eötvös Loránd University (ELTE), Budapest) and Prof. Dr Ulla Liukkunen (University of Helsinki, Finland).

As stated before, this report is a collective work and its findings are partially the result of compromises. The present report has benefited greatly from the input of the external experts, but it must be understood that its contents do not necessarily reflect the personal view of any single external expert and may contain statements that are not supported by him or her. It must also be understood that this report endeavours to set out the common core, if not a compromise, of the opinions that have been expressed by those involved. The findings and suggestions in this report are not the reflection of individual opinions.

The aim of the study was to answer two main questions. The first one was what are the current gaps in the existing framework and to what extent this framework and to what extent this framework can be extended. The second question was what would be the advantages of the adoption of additional legislation at European level. The terms of reference contained further requirements with respect to the structure of the study, setting out further questions that would need to be addressed in order to answer the two main questions. This report has been structured on the basis of these questions and has been drafted in order to respect the further requirements of the terms of reference with respect to methodological approach and reasoned structure. In the limited time available to draw up this report it was only possible to consult existing sources of information, and the information provided by the external experts. Account was taken of legislation and official publications of the EU and of the Member States, case law of the courts of the EU and the Member States, and academic legal writing.

The scientific director, authors and external experts met on 4th – 5th June 2012 in The Hague to discuss the outline and main points of the project. The discussions primarily regarded the required additions to the current framework, the possibility of a more comprehensive codification and the way forward for the EU. Following the meeting, a draft report was prepared by the authors in consultation with the scientific director. This interim report was distributed to the external experts for comments and substantive input, where necessary, and subsequently sent to the responsible administrator with EP for inspection. After receipt of comments on the draft from the responsible administrator, a meeting took place on 23rd August 2012 in Brussels between the responsible administrator, the scientific advisor and the project leader. During this period, further comments on the draft report were also received from the external experts. Consultations on specific issues have further taken place between the authors and the external experts. Some of the external experts have offered contributions for the text of the report. Prof. Dr Francisco Garcimartin Alférez’s contribution clarified the gap that exists as a consequence of the exclusion of nuclear damage in the Rome II Regulation. Dr Agnieszka Frackowiak-Adamska provided information on Polish law that would otherwise have been inaccessible to the authors. Prof. Dr. Paul Beaumont provided sharp and useful comments on a draft of this report.

The final report was drawn up taking into account the comments of the responsible administrator. Comments, remarks and suggestions of the external experts have been integrated as much as possible into the final report as well. The text has been revised and proofread by an English native speaker with an academic background in private international law, Dr Ian Curry-Sumner of *Voorts Juridische Diensten (Voorts Legal Services)*, Utrecht, the Netherlands.

Outline of the report

The report is divided into two main parts. Part I identifies the current gaps in the EU private international law framework. These gaps result from exclusions in the existing instruments and absence of legislation in particular areas. It further studies which additions may be needed to the current legislative framework, primarily looking at the requirements of a genuine European area of justice and existing national legislation as well as how this can be achieved. Part II addresses the contributions and advantages of the proposed additions to the framework as well as possibilities for and the approach of a more comprehensive codification (a code).

PART I: CURRENT GAPS AND FUTURE PERSPECTIVES

Introduction: the notion of private international law

The term 'private international law' covers the part of the law that deals with private law cases with a foreign or cross-border element. Traditionally three types of questions are distinguished. The first question is which court has jurisdiction to deal with a case with international elements ('jurisdiction'). The second question is what internal private law has to be applied to this case ('choice of law'). The third question concerns the significance of a foreign judgment, whether a judgment can be recognised as decisive and final in another state and whether, once a judgment has been recognised that compels a party to do or not to do something, this judgment can be enforced in the other state ('recognition and enforcement').

Private international law traditionally was and for a part still is national law. Each state has its own rules to deal with jurisdiction, applicable law and recognition and enforcement of foreign judgments. These national rules are not necessarily similar and even today the contents of a national system of private international law may range from sparse case law on basic issues to a complete codification. Nevertheless, the development of the principles of private international law has been an international process that originated in Europe and that can be traced back for centuries. Across borders, legal scholars have discussed the guiding principles of private international law and have tried to find common ground for the rules of private international law. International co-operation in the field of private international law gained ground in the beginning of the twentieth century and accelerated after the Second World War. An important factor in furthering international co-operation was the Hague Conference on Private International law which has been working on the progressive unification of private international law since 1893 and has done so as an intergovernmental organisation since 1955.

Europe has taken an interest in issues of private international law since the 1957 Treaty on the European Economic Community. Article 220 EEC Treaty obliged the Member States to enter into negotiations with each other with a view to securing a variety of issues for the benefit of their nationals. Several of the issues mentioned in Article 220 EEC Treaty are relevant for cross-border aspects of private law, such as the enjoyment and protection of rights under the same conditions as accorded to own nationals of the Member State, the mutual recognition of companies or firms and the retention of legal personality in the event of transfer of seat from one country to another, and the simplification of formalities concerning the reciprocal recognition and enforcement of judgments of courts or tribunals or of arbitration awards.

The 1997 Amsterdam Treaty introduced the wider concept of judicial co-operation and brought the three core issues of private international law into the scope of the European Community (Article 65 under (a), third indent; and (b) EC 1997). The three core issues are now found in Article 81 (2)(a) and (c) TFEU.

The traditional ambit of private international law must be distinguished from other areas of private law with an international dimension. Uniform private law concerns the unification of substantive private law, e.g. material provisions on sales contracts, as contained in the 1980 Vienna Convention on the Sales of Goods (CISG) or on contracts for the carriage of goods, such as the CMR Convention on carriage of goods by road. These conventions set out substantive rules of private law that are to apply only in an international situation, e.g. when the parties to a contract are resident in different states, and that seek to offer an alternative for the application of substantive national law in cross-border cases. Some conventions on uniform law seek to make uniform law that will be applied in internal cases, without the requirement of an international element. An example of the latter category of uniform law

conventions would be the conventions concluded between the Benelux countries (Belgium, the Netherlands and Luxembourg) containing uniform legislation on a variety of (specialised) subjects, e.g. the 1962 Benelux Trademark Convention or the 1973 Benelux Convention on the penalty payment (in French: ‘*astreinte*’).

Much work has also been done in the area of comparative private law, particularly in the EU, leading to proposals, often called ‘Principles’ for universally accepted rules of private law. As important as the achievements of comparative law are, their purpose is entirely different from that of private international law. While private international law seeks to offer solutions as long as the substantive private law differs between states, the activities of comparative lawyers aim to offer sets of rules that can replace the national private law rules in internal cases as well as in international cases.

In addition to the three traditional branches of private international law - jurisdiction, applicable law and recognition and enforcement - a fourth area is also relevant for private international law cases, namely residual questions of judicial co-operation. This fourth area will not be considered part of the private international law rules that will be researched in this report as was mentioned in the Introduction. It is noted that some instruments that contain rules on private international law, as it is understood for the purpose of this study, also contain rules on international co-operation. Clear examples are Regulations Brussels II-bis and the Maintenance Regulation. It should further be understood that instruments on judicial co-operation can be highly relevant for the functioning of the instruments on the core of private international law. An example is the Service Regulation, which supports the functioning of, *inter alia*, Regulations Brussels I and II-bis.

Special legislative procedure in respect of family law

Private international law encompasses in principle the full ambit of private law. In this respect it is necessary to note that when EU legislation on a private international law matter that concerns family law is considered, it is necessary to follow a special legislative procedure whereby unanimous action of the Council, after consultation of the European Parliament, is required. This follows from Article 81(3) TFEU, which provides that measures concerning family law with cross-border implications shall be established by the Council acting in accordance with a special legislative procedure. On the basis of the passerelle clause of Article 81(3) TFEU the Council, acting unanimously and after consultation of the Parliament, could decide to follow the ordinary legislative procedure in respect of a clearly determined aspect of family law. To give an example at random, such a decision could decide to follow the ordinary procedure for legislation in the area of protection of adults. Such a decision will however not be adopted by the Council when it is opposed by national Parliaments.

1. THE EXISTING GAPS IN THE EUROPEAN FRAMEWORK OF PRIVATE INTERNATIONAL LAW

1.1. The contents of the current framework

In the 21st century the regulation became the instrument of choice for the EU legislature in the area of private international law. The Amsterdam Treaty provided the legal basis to develop the framework of private international law much more consistently through EU legislation. Since 2000 thirteen regulations have been adopted that are relevant for the European framework of private international law. It should be noted that Denmark does in principle not take part in the adoption of measures to further the area of freedom, security and justice (Protocol 22, TEU/TFEU) and that participation by Ireland and the United Kingdom is dependent on these Member States' decision to opt in to such measures (Protocol 21, TEU/TFEU). On the basis of an agreement between Denmark and the EU Denmark now takes part in Brussels I.

The origins of instruments on private international law that are part of or that are considered closely linked to the community legal order can be traced much further back.

The most tangible product of Article 220, EC Treaty was the 1968 Brussels Convention, amended by Protocols of 1978, 1982, 1989 and 1996 and now replaced by Regulation 44/2001 (Brussels I). The need for a separate convention on the recognition and enforcement of arbitral awards was rejected during the 70s, on the ground that there were already many international agreements on arbitration (see the Jenard Report, OJ 1979, C 59/13). The 1968 EC Convention on the mutual recognition of companies never entered into force and an instrument on the transfer of seat, although mentioned in Article 220 EC Treaty, never came to light. The 1980 Rome Convention on the Law Applicable to Contractual Obligations is not linked to Article 220 EC Treaty, apparently because it was once anticipated that non Member States would become party to that Convention.

A number of directives adopted during the 20th century contain rules of private international law, or rules relevant for the international scope of substantive rules of private law. The Second and Third Directives on Life and Non-Life Insurance Law contain choice of law rules for insurance contracts. Other Directives indicate the applicable law for specific purposes, or contain scope rules that influence the applicable law. Reference can be made to Directive 93/13/EEC on Unfair contract terms (article 6), Directive 2008/122/EC on timeshare (Article 12(2)) and Directive 93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State (Articles 9 and 12).

1.2. The legislative framework in force

This sub-section shortly discusses the current legislative framework as a first step to the identification of the gaps in the next subsection. Though this report is limited to jurisdiction, the applicable law and recognition and enforcement, some of the legislative instruments that will be discussed hereunder also include residual questions of judicial co-operation. Sometimes rules relevant from the perspective of private international law have been made part of instruments mainly dealing with problems of substantive law, as is the case for a number of Directives. Some instruments that deal with a selected area of private international law, also cover other areas, notably judicial co-operation.

1.2.1. Regulations

In chronological order, the following Regulations have been adopted on the basis of Article 65 TEU or later Article 81 TFEU:

1. Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings (OJ L 160, 30.6.2000, p. 1-18).
2. Council Regulation No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I”) (OJ L 12, 16.1.2001, p. 1-23). This Regulation will be replaced as a result of an ongoing revision in the near future.
3. Council Regulation (EC) No. 1206/2001 of 28 May 2001 on co-operation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1-24).
4. Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (“Brussels II-bis”) (OJ L 338, 23.12.2003, p. 1-28).
5. Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims OJ L 143, 30.4.2004, p. 15-39).
6. Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure (OJ L 399, 30.12.2006 p. 1-32).
7. Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure (OJ L 199, 31.7.2007 p. 1-22).
8. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (“Rome II”) OJ L 199, 31.7.2007, p. 40-49).
9. Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000 (OJ L 324, 10.12.2007 p. 79-120).
10. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (“Rome I”) (OJ L 177, 4.7.2008, p. 6-16).
11. Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and co-operation in matters relating to maintenance obligations (OJ L 7, 10.1.2009, p. 1-79).
12. Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced co-operation in the area of the law applicable to divorce and legal separation (“Rome III”) (OJ L 343, 29.12.2010, p. 10-16).
13. Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ L 201, 27.07.2012, p. 107-134).

To this list could be added Regulation Brussels II (Regulation (EC) No. 1347/2000 (OJ L 160, 30.6.2000, p. 19-36)), which was short-lived and has since been repealed by Regulation 2201/2003 (Brussels II-bis). It should be pointed out that between the 13 regulations now

in force, their relevance for issues of jurisdiction, applicable law or recognition and enforcement varies. Some regulations predominantly deal with issues of private international law. Clear examples of such instruments are Regulations Brussels I and II-bis, dealing with jurisdiction and recognition and enforcement, and Regulations Rome I, II and III, dealing with applicable law. The Insolvency Regulation deals with issues of private international law, but also introduces a hitherto unknown system of cross-border rules on procedural law, of primary and secondary insolvency proceedings. The regulations on the European Enforcement Order, the European Payment Order and the European Small Claims Procedure are relevant for the recognition and enforcement of judicial decisions, but their existence cannot be dissociated from Brussels I.

The Maintenance Regulation (4/2009) is the first instrument that addresses all main questions of private international law, jurisdiction, applicable law and recognition and enforcement, combined with provisions on judicial co-operation. It should be noted that at one stage it was also envisaged that the choice of law rules on divorce, now found in Rome III, would be included in an amended version of the Brussels II-bis Regulation. If the Commission's initial proposal had been adopted, then there would have been yet another instrument combining the three main problems of private international law in the area of family law.

Not all regulations listed above contain private international law rules, in the meaning of rules on jurisdiction, applicable law or recognition and enforcement. Some of the regulations are aimed at facilitating cross-border litigation. Clear examples are the Evidence Regulation (1206/2001) and the Service Regulation (1393/2007) which are essential for courts and litigants involved in cross-border proceedings. In view of the ambit of this study these regulations will not be discussed any further.

The applicability of national private law rules is also determined in Council Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (e.g. articles 2, 9, 13, 14, 15, 19) and Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) (e.g. Articles 9, 15, 47, 49, 53-57, 59, 62).

1.2.2. Regulations expected in the near future

Proposals for regulations on matrimonial property and registered partnerships were published March 2011, see the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (2011/0060 (CNS)) and the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (2011/0059 (CNS)).

1.2.3. EU-Regulations and specific Hague Conventions

Instruments of the framework contain specific references to Hague Conventions or integrate the Hague Convention into the framework. This is currently the case for:

the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Child Abduction Convention);

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 (1996 Child Protection Convention);

the Hague Protocol on the Law Applicable to Maintenance Obligations 2007.

References to the 1980 Child Abduction Convention and the 1996 Child Protection Convention are found in Brussels II-bis. The 2007 Hague Protocol on the law applicable to

maintenance obligations has been integrated into the Maintenance Regulation. The 2007 Protocol has also been ratified by the European Union, except for Denmark and the United Kingdom.

Article 30(1), Rome II Regulation mentions the need for a study on the effects of Article 28, Rome II with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

1.2.4. Directives

In the field of judicial cooperation in civil matters, two directives have been adopted, containing measures that are necessary for the proper functioning of the internal market. Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes¹ seeks to promote the application of legal aid in cross-border disputes. 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 matters² applies to cross-border mediation. Mediation is a process whereby parties attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. These directives support judicial cooperation in civil matters, but do not deal with the three core issues of private international law, as defined for the purpose of this report. An example of the link between these instruments and the true private international law instruments can be found in recital 20 of Directive 2008/52/EC on mediation. The recital suggests that mediations which have been made enforceable in a Member State could be recognised and declared enforceable in another Member State on the basis of the Brussels 1 Regulation or possibly the Brussels II-bis Regulation.

1.2.5. Other relevant EU legislation

The possibility to transfer the seat of a corporation from one Member State to another and the possible consequences for the law applicable to such a corporation has been at issue in a string of cases decided by the CJEU, since the 1988 decision *Daily Mail* (C-81/87). Without claiming to be exhaustive, the current case law comprises the cases *Überseering*, (C-208/00), *Inspire Art* (C-167/01), *Sevic* (C-411/03), *Cartesio* (C-210/06) and *National Grid* (C-371/10). In essence, the decisions concern the relation between the right of establishment (Articles 49-55 TFEU) and the private law rules applicable to a corporation.

Case law has further determined the scope of private law harmonised by Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents. In *Ingmar* (C-381/98) the court decided that Articles 17 and 18 of Directive 86/653/EEC were applicable to the termination of a commercial agency agreement that had been concluded between a commercial agent who was active in a Member State for a principal established in a third state, while the contract contained a choice of law clause for the law of a third state.

In particular the circumstances in *Cartesio* (C-210/06) illustrate the need to find an appropriate solution for the cross-border transfer of registered seats. To this end, the European Parliament adopted a resolution on 2 February 2012 recommending the Commission to initiate the procedure for the adoption of a 14th company directive which would regulate the cross-border transfer of the registered office of limited companies. The directive had already been envisaged by the European Commission and a public consultation on the planned proposal was already held on 2004. However, the Commission’s work on the Directive was ceased in 2007. The 2012 Recommendations of the European Parliament

¹ OJ L 26, 31.1.2003, p. 41-47.

² OJ L 136, 24.5.2008, p. 3-8.

include the scope of the Directive to be adopted, the effects of a cross-border transfer, transparency and information rules prior to the transfer decision, the decision by the meeting of shareholders, verification of the legality of the transfer, protective measures and employees' rights.

1.3. Exceptions to the scope of the EU Regulations

The identification of potential gaps in the current framework was carried out with a reference primarily to the provisions on the substantive (material) and territorial scope of application, as well as to the relevant ECJ case law concerning the application and interpretation of these provisions.

1.3.1. Brussels I Regulation (No. 44/2001)

Article 1 (1) and 1(2) Brussels I – substantive scope of application

Article 1(1) and 1(2) Brussels I define the substantive scope of application of the Regulation's provisions on jurisdiction and enforcement of judgments in almost identical manner as the 1968 Brussels Convention. In general, the terms and concepts of the Regulation are to be interpreted autonomously. The same holds true for the provision of Article 1(1) according to which the Regulation is to apply to 'civil and commercial matters', regardless of the court or tribunal. Revenues, customs and administrative matters are mentioned as examples of disputes that are expressly excluded. Thus, it is intended to apply to matters of private law, with a general exclusion of the matters of public law.

The meaning and the reach of the 'civil and commercial matters' has been the subject of interpretation by the ECJ within the context of disputes between a private party and a public authority (see e.g. *TIARD* (C-266/01) ; *LTU v. Eurocontrol* (C-29/76) ; *Sonntag v. Waidmann* (C-172/91) ; *Gemeente Steenberg v. Baten* (C-271/00)). The clear distinction between 'civil and commercial matters' and matters of public law is not always easily made. Yet it is doubtful whether a more precise definition in a PIL codification in that respect would prove useful in drawing this line of delimitation.

Most matters excluded in Article 1(2)(a) ('the status or legal capacity of natural persons, rights in property arising out a matrimonial relationship, wills and succession') are now regulated by other EU instruments or their regulation is currently being discussed. The principal gap remains the status and legal capacity of natural persons. Divorce and legal separation, which can be considered as problems of status, are now regulated in Brussels II-bis, as is the case for parental responsibility. All private international law aspects of wills and succession are regulated by the Succession Regulation. The private international law aspects of matrimonial property regimes and the property regimes for registered partnerships are expected to be regulated in future regulations.

The provision on maintenance in the Brussels I Regulation was deleted when the Maintenance Regulation came into force on 18th June 2011. As a consequence it must be understood that maintenance is no longer part of the subject matter of scope of Brussels I.

The issues of 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' are excluded by Article 1(2)(b) Brussels I. These issues are dealt with in the Insolvency Regulation. Not only matters of insolvency proceedings in the narrow sense are excluded, also other proceedings which directly derive from or are closely linked to proceedings for realising the assets or judicial supervision connected with the bankruptcy case. An example is the action against a manager of a company in insolvency proceedings to bear part of the company's debt (see *Gourdain v. Nadler* (C- 133/78); see also, in respect of avoidance of fraudulent transactions, *Christofer Seagon v. Deco Marty Belgium NV* (C-339/07)).

National legal systems may apply distinct criteria to determine which matters do or do not pertain to insolvency proceedings. As a consequence there may be uncertainties on the substantive scope of application of these two instruments, Brussels I and the Insolvency Regulation. The ECJ ruling in *German Graphics (C-292/08)* is illustrative of the dilemma. By referring to its earlier ruling in *Gourdain v. Nadler (C-133/78)*, the ECJ held that the closeness of the link between a court action in the main proceedings (*in casu*, the claim of a seller based on a reservation of title against an insolvent purchaser) and the insolvency proceedings is decisive for the purposes of deciding whether the exclusion of Article 1(2)(b) is applicable (para. 29). The court concluded that an action brought by a seller against a trustee in liquidation proceedings on the basis of a reservation of title clause is not based on the insolvency law. As such, it does not fall within the scope of application of the Insolvency Regulation, but instead it is within the scope of application of the Brussels I Regulation.

Some may question the decision in *German Graphics (C-292/08)*, as the nature and effects of retention of title clauses may have a bearing on the extent of the property of the estate. Considering that there is no uniformity among the internal laws of the EU Member States on the qualification of these issues, for the sake of legal certainty and uniformity of results, it appears advisable to define this issue more clearly and address the interaction between these two instruments in a more precise manner.

A 2012 CJEU decision further supports the need for a clearer definition of the substantive scope of the Insolvency Regulation (*F-Tex SIA, C-213/10*). The Court held that ‘Article 1(1) of [Brussels I] must be interpreted as meaning that an action brought against a third party by an applicant acting on the basis of an assignment of claims which has been granted by a liquidator appointed in insolvency proceedings and the subject-matter of which is the right to have a transaction set aside that the liquidator derives from the national law applicable to those proceedings is covered by the concept of civil and commercial matters within the meaning of that provision.’ To an extent the decision appears to contravene or at least undermine the holding in *Christofer Seagon (C-339/07)* on the avoidance of fraudulent transactions. Gaps that may follow from other provisions of the Insolvency Regulation will be addressed hereunder.

The exclusion of social security in Article 1(2)(c) appears unnecessary, as it is a matter pertaining to public law. However, an action seeking a recovery of payments made on the basis of social insurance does fall within the scope of the Regulation (*Gemeente Steenbergen v. Baten (C-271/00)*).

As to the arbitration exception, the existence of the 1958 New York Convention was the major reason for excluding arbitration from the scope of application of the 1968 Brussels Convention. Not only arbitration proceedings and awards are excluded, but also court proceedings related to arbitration (e.g. referral to arbitration by a court seised of a matter upon an objection of a party that there is a valid arbitration agreement, decisions rendered in the setting aside proceedings or decisions on the validity of arbitration agreements).

It already follows from the Report on the accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters³ that ‘...the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Convention, must be considered as falling within its scope.’⁴ Thus, if the issue of arbitration (e.g. the validity of an arbitration agreement) is dealt with as a main issue in proceedings before the court, a decision rendered would not be within the scope of the Brussels I Regulation. However, if the question of validity of an arbitration agreement appears as an incidental question, the

³ OJ 1986, C 298/1.

⁴ Para 35 of the Report on the accession of the Hellenic Republic.

question whether a matter falls within the scope of the Regulation is to be answered with the reference to the main subject-matter.

The interpretation of the arbitration exception has on several occasions been submitted to the CJEU. Some questions of the interaction between the Brussels I and arbitration have already sufficiently been clarified in the ECJ case law (*Marc Rich and Co. AG v. Societa italiana Impianti PA*, (C-190/89), para. 24), stating that the nature of the subject matter is crucial when deciding whether or not a dispute falls within the scope of the Regulation). The holding that the substantive subject-matter of the dispute was decisive when determining whether a dispute fell within the scope of the Regulation has been maintained in subsequent decisions.

It appears that the scope of the arbitration exception under Regulation Brussels I needs further clarification. Also, there may be a need to address other aspects, considering that some ECJ decisions provoked considerable debate and were the subject of criticism (e.g. *Van Uden v. Deco-Line*, (C-391)) and especially *Allianz SpA et al. v. West Tankers, Inc.* (C-185/07). Besides, court decisions in some Member States illustrate further potential problems on the interaction between arbitration and the Regulation⁵.

The Proposal of 14th December 2010 for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (COM(2010)748 final 2010/0383 (COD)) suggests to partially delete the arbitration exception. Thereby it attempts to deal with only one issue ('enhanced effectiveness of arbitration agreements'), leaving all other questions unaddressed. The suggested partial deletion is, however, disputed and could cause difficulties in the interpretation and application of the revised Regulation.

In order to enhance the attractiveness of arbitration within the EU, a more comprehensive legal regulation of arbitration may be considered. This is particularly so bearing in mind that the 1958 New York Convention only addresses a limited number of issues (enforceability of arbitration agreements and the recognition and enforcement of foreign arbitral awards) and that the 1958 Convention itself is outdated and needs to be revised. The 1962 Geneva (European) Convention does contain a number of useful provisions, but has a rather restrictively defined territorial scope of application. Besides, not all EU Member States are the signatories to this Convention.

Territorial scope of the jurisdiction provisions

The territorial scope of application may be derived from Articles 3 and 4 of the Brussels I Regulation. In connection with the territorial scope of application of the Brussels I Regulation, the following can be concluded from these provisions:

(a) The Brussels I Regulation only applies if a defendant is domiciled in a Member State, with the exception of exclusive jurisdiction under Article 22 and the case of a prorogation of jurisdiction under Article 23. In other words, the courts in the Member States may base their jurisdiction on these provisions even if a respondent does not have a domicile in a Member State.

(b) A defendant with a domicile in a Member State can be sued in the courts of another Member State only on the basis of the rules of jurisdiction provided in the Regulation.

(c) If a defendant has no domicile in a Member State, any person domiciled in a Member State shall, notwithstanding his/her nationality, be able to rely on the national rules of jurisdiction applicable in this state.

⁵ See decisions of courts in France that expressed the readiness to enforce an arbitral award that was annulled in another EU Member State; *SNF v. Cytec*, Paris Court of Appeal of 13 March 2006; French Supreme Court of 4 June 2008, *Clunet* 2008, 1107. See also Court of Appeal of Brussels of 22 June 2009, *Revue de l'arbitrage* 2009, 574..

The definitions of ‘domicile’ for legal persons are given in Article 60, whereas the provision of Article 59 refers to the conflict of law rules to determine ‘domicile’ of natural persons.

For the scope of application of the jurisdiction rules of Brussels I, reference should also be made to *Group Josi (C-412/98)*, which held that the Brussels Convention, the predecessor of Brussels I, is ‘in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff’s domicile being in a Contracting State’.

The Commission’s Proposal of 14th December 2010 suggested that the so-called ‘universal’ scope of application of the jurisdictional rules is introduced. It is understood that some extension of the jurisdiction rules of Brussels I will be pursued in the future adaptation of the current instrument. The scope would remain limited with respect to the enforcement and recognition of foreign judgments.

Territorial scope in respect of recognition and enforcement

The wording of Article 32 indicates that the territorial scope of application with respect to the recognition and enforcement of judgments is limited so as to include the decisions rendered by the courts in the EU Member States. It applies to the decisions issued by the courts of the EU Member States regardless of how a judgment is called (a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court) and regardless of where the judgment debtor is domiciled (thus, also if it is domiciled in a ‘third’ country). Considering that the Regulation is intended to facilitate free movement of judgments within the EU (Recital 10), it is not expected to extend the scope of application to the judgments rendered by the courts of third countries.

Relationship with international conventions (Article 67 et seq.)

The judgment, *TNT Express Nederland BV v. AXA Versicherung AG (C-533/08)* illustrates that there may be certain restrictions in the application of Article 71 of the Brussels I Regulation. This provision gives prevalence to international instruments that in relation to particular matter govern jurisdiction or the recognition or enforcement of foreign judgments.

According to Article 71(1), the Brussels I 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’. In paragraph 2(a) it provides that ‘this Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that Convention ...;’. In paragraph 2(b) it provides that ‘judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member State in accordance with this Convention. (...)’.

The decision in *TNT Express Nederland BV v. AXA Versicherung AG (C-533/08)* involves the Convention on the Contract for the International Carriage of Goods by Road, Geneva 19 May 1956, as amended by the Protocol signed at Geneva on 5 July 1978 (hereinafter: ‘CMR’). In interpreting Article 71 of the Regulation, the Court held that even though Article 71 provides for the application of such conventions, ‘their application cannot compromise the principles which underlie judicial co-operation in civil and commercial matters in the European Union, such as the principles, recalled in recitals 6, 11, 12, and 15 to 17 ...’. Also, its application cannot undermine the ‘free movement of judgments in civil and commercial matters, predictability as to the courts having jurisdiction and therefore legal certainty for litigants, sound administration of justice, minimisation of the risk of concurrent proceedings, and

mutual trust in the administration of justice in the European Union.’ (*TNT Judgment*, par. 49).

Gaps as a consequence of references to national law

The case law of the ECJ emphasises an ‘autonomous interpretation’ of the EU instruments. However, no uniform definition of domicile of a natural person is provided. Instead, a conflicts of law rule in that respect is provided in Article 59 of the Regulation. Considering that there may be different criteria and different approaches used in various jurisdictions to define the ‘domicile’ of a physical person it is unlikely that uniformity in this respect can be reached among the EU Member States.

1.3.2. Regulation Brussels II-bis (No. 2201/2003)

The Regulation applies to divorce, legal separation or marriage annulment and the attribution, exercise, delegation, restriction or termination of parental responsibility (Article 1(1) of the Regulation).

Excluded matters

Article 1(2) of Regulation Brussels II-bis contains a summing up of issues that are deemed to be civil matters in relation to the attribution, exercise, delegation, restriction or termination of parental responsibility. Examples of the issues mentioned in this summing-up are rights of custody and rights of access, guardianship and curatorship, the designation and functions of any person or body having charge of the child’s person or property, representing or assisting the child, the placement of the child in a foster family or institutional care, measures to protect the child’s property. Article 1(3) of Regulation Brussels II-bis expressly excludes from its scope the establishment or contesting of a parent-child relationship, adoption, the name and forenames of the child, emancipation, maintenance obligations, trusts or successions, measures taken as a result of criminal offences committed by children.

Considering that some of these excluded matters have already been regulated by EU instruments (maintenance obligations, most recently successions), the gap is identified in the matters of establishment or contesting of a parent-child relationship, adoption, the name and forenames of the child, emancipation, trusts, and measures taken as a result of criminal offences committed by children.

Residual jurisdiction

Jurisdiction in divorce cases is not provided for by Regulation Brussels II-bis in cases where spouses are not habitually resident in the EU. The principal exception is the case where spouses habitually resident in a third state share the nationality of a Member State. The regulation does not provide a ground for jurisdiction when spouses of mixed EU nationality are both resident in a third state and wish to divorce.

The scope of application is clearly defined with respect to jurisdiction in matters of parental responsibility under the Brussels II-bis Regulation. It follows from Article 8 that the scope of application regarding parental responsibility is in principle reduced to cases when a child has its habitual residence in a Member State at the moment the court is seized. Article 12(4) Brussels II-bis does under circumstances allow prorogation of jurisdiction in favour of a court of a Member State, even if the child has habitual residence in a third state.

Conversely, with respect to jurisdictional rules for divorce and legal separation the provisions on the scope of application have raised difficulties in interpretation and application. In contrast to the clearly defined scope of application of the Brussels I Regulation, the Brussels II-bis Regulation does not have such a clear provision defining its

territorial scope of application concerning jurisdiction in matters relating to divorce, legal separation and marriage annulment. Instead, it provides in Article 6 that the rules on jurisdiction under Articles 3, 4 and 5 are exclusively competent if a respondent is either habitually resident in a Member State or a national of a Member State or, in the case of the United Kingdom and Ireland, is domiciled in these two states.

The rule on residual jurisdiction, contained in Article 7 of the Brussels II-bis Regulation, determines when the national rules on jurisdiction may be applied by a court in the Member States. As already stated, this provision, in particular in connection with Article 6 on the exclusive nature of jurisdiction, has been the subject of different interpretations. Thus, some authors have concluded that these two provisions imply the applicability of the Brussels II-bis Regulation in the following situations, referring to Article 7 and 8: (a) if both spouses are nationals of one of the Member States, (b) if one of the petitioners is habitually resident in one Member State in case of a joint application, (c) the respondent is habitually resident in or (d) is a national of a Member State. Authors in the Netherlands have argued that the jurisdiction rules of Brussels II-bis for divorce, legal separation and marriage annulment have “universal application”. It should be noted that in the practice of the Netherlands courts the universal application, or not, of the jurisdiction rules of Brussels II-bis for divorce is insignificant as national legislation provides that the jurisdiction rules of Brussels II-bis will also be applied analogously as residual jurisdiction rules. There are no separate national rules that would lead to a different result in a case that is outside the scope of Brussels II-bis.

The decision in *Kerstin Sunderlind Lopez* (C-68/07), offers some clarification in respect of application and interpretation of Articles 6 and 7. It was held that a national or a habitual resident of a Member State may be summoned before the courts of another EU Member State only on the basis of the jurisdictional rules contained in Article 3. It was also held that, ‘where, in divorce proceedings, a respondent is not habitually resident in a Member State and is not a national of a Member State, the courts of a Member State cannot base their jurisdiction to hear the petition on their national law, if the courts of another Member State have jurisdiction under Article 3 of that regulation’.

The difficulties in application and interpretation of Article 6 and 7 Brussels II-bis on themselves already raise the question whether it is not necessary to amend the Regulation. Part of the problem appears to be that under Regulation Brussels II-bis citizenship of a Member State, irrespective of the country of habitual residence, can be a ground for jurisdiction. In this respect the situation differs from the system of Brussels I, in which jurisdiction of the court of the domicile of the defendant within the EU is the principal rule. Whether the defendant is also a national of a EU Member State is irrelevant.

In principle one could argue that these specific cases could be repaired by national legislation that can be applied as residual rules under Brussels II-bis. One lesson from the decision in *Kerstin Sunderlind Lopez* (C-68/07) is that the possibility to apply such national rules is restricted, also in respect of those who are not nationals of a Member State and are not habitually resident in a Member State. Even against such respondents (by necessity third state nationals habitually resident in a third state) such residual jurisdiction cannot be exercised if the court of another Member State has jurisdiction under Article 3 Brussels II-bis. In the case of *Kerstin Sunderlind* the French courts had jurisdiction under Brussels II-bis as the couple had last lived in France and Ms Sunderlind still resided in France. The husband was a Cuban national who at the time of the divorce proceedings resided in Cuba. Ms Sunderlind attempted to rely on a residual Swedish rule, that provided that matrimonial cases may be heard by the Swedish courts if the plaintiff is a Swedish citizen and is resident in Sweden or has been resident there after attaining the age of 18.

In view of the emphasis that the Court of Justice places on application of the jurisdiction rules of Brussels II-bis, the scope for application of residual rules, if they exist at all, is diminishing. See in this respect also the case of the spouses from the Netherlands and Italy,

discussed in Chapter 4.1., who were resident in a third state and found they were unable to divorce in that state or before a court of a Member State. Even if there had been a national residual rule that could have been relied upon by one of these spouses, e.g. similar to the Swedish rule, the question could be raised whether such a rule could be relied upon. Article 6 Brussels II-bis appears to prohibit the application of such a residual rule against a respondent spouse who is national of another Member State, even when domiciled in a third state.

Exclusion of prorogation of jurisdiction in divorce cases

Article 12 of the Brussels II-bis Regulation provides, under certain circumstance, the possibility to agree on the competent court in matters of parental responsibility. However, there is no such possibility of prorogation of jurisdiction in the matrimonial matters. This was identified as a gap under the Brussels II-bis Regulation in the Commission's Proposal of 2006 and of 2007. The Proposal contained the amendment to the jurisdictional rules so as to allow the parties to choose a competent court in proceedings relating to divorce and legal separation under certain conditions. First, the choice was limited to the courts of the Member States with which there is a 'substantial connection'. Besides, it was required that a choice of court agreement must be concluded in writing and provide for a definition of a 'written form' requirement. As to the 'substantial connection' requirement, it is appropriate to determine the point in time which would be relevant for determining whether 'a substantial connection' exists.

It may be generally desirable to provide for the possibility for the spouses to agree on jurisdiction, especially when there is no possibility for the courts in EU Member States to otherwise ascertain jurisdiction (e.g. regarding couples of different nationalities residing in a third state). Yet the enforceability of forum selection clauses concluded earlier (e.g. contained in a marriage contract) should be carefully considered, particularly because the circumstance may substantially change from the moment of entering into the contract and the moment of filing for divorce. The Commission's Proposal indicated that the 'substantial connection' existed in all cases mentioned in Article 3 of the Regulation as jurisdictional grounds in matrimonial matters. Besides, the Proposal introduced additional grounds of jurisdiction based on the prorogation of jurisdiction. It was intended that couples of different nationalities living outside the EU would be given the opportunity to petition for divorce in a Member State. Under the Brussels II-bis Regulation currently in force, there is no possibility for the courts in the Member States to ascertain jurisdiction regarding couples of different nationalities residing in a non-EU country. It may be appropriate to introduce the possibility of prorogation of jurisdiction, in order to minimise such difficulties for spouses of different EU nationalities living in a third country.

Practical difficulties in the interpretation of jurisdictional grounds

Problems may occur when dealing with the interpretation of the flexible concept of habitual residence, which is relevant for jurisdiction under Regulation Brussels II-bis.

It is generally accepted that the concept of 'habitual residence' in private international law must be flexible. Flexibility is considered important in light of the international character of the case. The typical international case may involve jurisdictions whose systems of law have little in common. The litigants may hold to values that are typical for one of the legal systems involved and which may further increase the differences. In line with the traditional approach of private international law recent case law of the Court of Justice (In re: A. (2009 C-523/07) emphasises the need to take into account all circumstances specific to each individual case. The potential problem is that the flexibility that is so greatly appreciated for one-off, atypical cases becomes a complicating factor when the number of cases of a similar type increases. An example are child abduction cases, which usually require the court to establish the place of habitual residence of the parties and the child and which must be handled expeditiously. At this stage, however, it would be incorrect to describe the

reference to ‘habitual residence’ as a gap. In the course of the periodical evaluations of EU legislation, it may transpire that refinements are required.

Other (debatable) substantive gaps (e.g. the divorce between same-sex spouses)

The fact that there is no definition of ‘marriage’ in the Regulation may result in difficulties for the same-sex spouses to find a competent court to obtain a divorce. It does not seem likely that it would be possible to apply for divorce in EU Member States where the same-sex marriages are unknown (i.e. are neither regulated nor permitted), unless the courts in some EU Member States would be prepared to apply some other substantive law for the purposes of characterisation of a ‘marriage’ rather than the *lex fori*. Otherwise the jurisdictional rules on the divorce under the Regulation would then be of no use for same-sex spouses. Therefore, a possibility to agree on jurisdiction of the courts may be useful for such spouses.

Exclusion of Denmark

A separate agreement may be concluded with Denmark, as it was the case with respect to the Brussels I Regulation and the Service Regulation.

Relation to other instruments (Article 59 et seq, notably 62)

It does not seem that serious problems arise from the provisions of Article 59-62, which define the relationship of the Regulation with other instruments. In principle, provisions of the Regulation prevail over other instruments in the matters that are regulated by both instruments. In other matters, i.e. those not regulated by the Regulation, the conventions indicated in Article 59-61 shall continue to have effect. Only for choice of court agreements in respect of parental responsibility will the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children prevail over the provision of Article 12 of the Regulation, when the child has her or his habitual residence in the territory of a State which is a contracting party to the Convention (Article 12(4) Brussels II-bis).

1.3.3. Regulation Rome I (No. 593/2008)

Excluded matters (Article 1 (1)-(3))

Certain matters excluded from the substantive scope of application of the Regulation Rome I are either dealt with in other EU instruments (e.g. obligations arising out of family relationships, including maintenance, wills and successions, choice of court agreements falling within the scope of the Regulation Brussels I, *culpa in contrahendo*, evidence) or are currently discussed (e.g. obligations arising out of matrimonial property regimes and property regimes of registered partnerships).

Some issues that are excluded from the substantive scope of application of the Regulation Rome I have been dealt with in other PIL conventions. However, not all EU Member States are signatories to these instruments. For example, conflict of law rules for obligations arising under bills of exchange and cheques are contained in Geneva Conventions from 1930 and 1931 respectively. Many, yet not all EU Member States have ratified these Conventions. The same holds true for the constitution of trusts and the relationship between the settlers, trustees and beneficiaries, as well as for the question whether an agent is able to bind a principal in relation to a third party. These issues have been dealt with in the 1985 Hague Convention on the Law Applicable to Trusts and on their Recognition and in the Hague Convention on Agency respectively. However, only a limited number of EU Member States are party to these conventions (e.g. the Netherlands is the only EU Member State that has ratified the Hague Agency Convention).

Arbitration agreements, as well as choice of forum agreements, are excluded from the scope of Regulation Rome I. The latter are dealt with in the Regulation Brussels I. The questions involving the status or legal capacity of natural persons, issues pertaining to the law of companies and other incorporated or unincorporated bodies (such as creation, legal capacity and internal organisation or winding-up, as well as personal liability of company officers) and certain collective insurance contracts concerning employed or self-employed persons in the event of death or illness related to work are also excluded from the substantive scope of application of the Regulation. These issues, together with the above-mentioned matters dealt with in other PIL instruments, could be identified as possible future subjects of EU PIL regulation.

Geographical restrictions

The Regulation applies in all EU Member States except Denmark. The latter continues to apply the 1980 Rome Convention on the law applicable to contractual obligations. Rome I provides for a universal scope of application in Article 2, without any requirement of reciprocity: a law applicable according to the provisions of the Regulation applies regardless of whether it is the law of a Member State. For the purposes of application of Articles 3(4) and 7, the term Member State includes Denmark, which does not appear to raise any particular problems in the application or interpretation of the Regulation.

Assignment and subrogation

The provision of Article 14 of the Regulation relates to the law applicable to assignment of debt and subrogation. However, during the drafting process no agreement could be reached on the conflict of law rule concerning the effectiveness of an assignment or subrogation of a claim against third parties. As Member States may follow different approaches in this respect, the review clause of Article 27(2) provides that the Commission should submit to the Parliament, the Council and the European Economic and Social Committee a report on this issue by 17 June 2010. To this end, the 'Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person' was drawn up on the request of the Commission in May 2012⁶.

As to the non-EU instruments, the 2005 Hague Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary may be mentioned (Hague Securities Convention). The Convention has not yet entered into force. The fact that the Convention has opted for party autonomy may have diminished the possibilities for the acceptance of the Convention within the EU. There may be a conflict between the approach followed in the Convention and existing community law. It is argued that if the Convention is adopted in the EU, it will affect Directive 2002/47/EC of the European Parliament and of the Council of 6th June 2002 on financial collateral arrangements, as well as Directive 98/26/EC of the European Parliament and of the Council of 19th May 1998 on settlement finality in payment and securities settlement systems. These directives, as amended (see Directive 2009/44/EC of the European Parliament and of the Council of 6th May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims) follow a different approach as to the governing law to be applied.

Relationship with other provisions of Community law

Article 23, Rome I gives priority to conflict of law rules in other existing and future EU PIL Instruments, as well as to national law of the EU Member States that implement EU directives.

⁶ See: http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf.

Yet the relevance and the nature of other EU instruments for the PIL regulatory framework are not always easy to discern. There are considerable differences amongst various EU instruments. Thus, mandatory rules of substantive law are usually found in the directives relating to consumer and labour law. They usually contain an explicit rule that may affect PIL rules (see, e.g. Article 6(2) of the Directive No. 93/13 of 5th April 1993 on Unfair Terms in Consumer Contract, providing that EU Member States must take the necessary measures that the consumer does not lose the protection granted by the Directive, by a choice of law of non-EU Member State; in similar vein, Directive No 2008/122 of 14 January 2009 on the Protection of Consumers in respect of certain Aspects of Timeshare, Long-Term Holiday Product, Resale and Exchange Contracts OJ 2009 L 33 p. 10). Such Directives restrict the right of the parties to contract out such protection of a weaker party ensured by the relevant provisions contained therein. They expressly provide that such protective provisions prevail over any conflict of law rule. However, some Directives do not contain such express provisions, which restrict the applicability of the chosen substantive law. For example, the Directive No 86/653 of 18th December 1986 on the Co-ordination of the Laws of the Member States Relating to Self-Employed Commercial Agents does guarantee that commercial agents are entitled to certain compensation after the termination of the agreement with the principal. It however contains no such provision corresponding to those incorporated in the ‘Consumer’ and the ‘Timeshare’ Directives. Yet the ECJ held that the provisions of the ‘Agency’ Directive had to be applied regardless of the choice of law clause, when the case is closely connected with the Community, especially when the agent carries out his activity in the territory of a Member State (*Ingmar* (C-381/98)). Finally, some directives, such as Directive No. 2000/31 of 8th June 2000 on Certain Legal Aspects of Information Services, in particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce) even expressly provide that ‘[t]his Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of the courts’ (Article 1(4)).

It is evident that the instruments discussed before do not contain identical or even comparable provisions with respect to PIL rules. It is, therefore, questionable whether they still may be the subject to an identical or similar interpretation in this context. If the Directives containing such express provisions as the Consumer and Timeshare Directive can be regarded as ‘provisions of Community law which ... lay down conflict-of-law rules relating to contractual obligations’ within the meaning of Article 23 of the Rome I Regulation, then their prevalence over the provisions of the Regulation would be ensured by Article 23. It is questionable whether the prevalence as provided under Article 23 may also extend to other Directives that do not contain such express provisions. In particular, it does not seem that it can be extended to the Directive on ‘Electronic Commerce’ considering that it expressly states that it ‘does not establish’ PIL rules, as already mentioned. Such ambiguities existing under the current EU legal framework can be perceived as an obstacle to proper interpreting and applying PIL rules. It is essential that the relevance and the interplay amongst such EU instruments are clearly defined.

If the applicability of Article 23 cannot be extended to such other Directives, it is then unclear whether the reasoning in the ECJ ruling in *Ingmar* is still applicable in the context of the Rome I Regulation. This is particular so considering that Article 9, Rome I substantially deviates from Article 7, Rome Convention. Besides, the meaning and the reach of this decision is unclear considering that the ECJ was not authorised to interpret the Rome Convention at the time when the *Ingmar* case was decided. Finally, it is questionable whether it is appropriate to perceive the reasoning of the ECJ in the context of these provisions, in particular of Article 7(1), Rome Convention. Namely, Article 7(1) gives the possibility to the court to apply mandatory rules (‘effect may be given’), whereas the *Ingmar* decision implies that a court in an EU Member State is under the obligation to apply the Agency Directive. The same holds true under Article 9(3), Rome I Regulation (‘[e]ffect may be given’). The only possibility would be to ‘place’ the *Ingmar* decision under Article 7(2), Rome Convention and the corresponding provision of Article 9(2), Rome I Regulation. The latter provides that ‘[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum’ (emphasis added). Thus,

mandatory rules of Directives would be applied as they are implemented in the legislation of the forum country. The same line of reasoning has been followed in Article 3(4), Rome I ('as implemented in the Member State of the forum'). Obviously, there is no clarity as to the nature and effect of such instruments and no certainty on a continued binding nature of the *Ingmar* decision. Some argue that this decision has been overruled by Article 3(4) of the Rome I Regulation, but some difficulties may be encountered in maintaining this view. Firstly, the nature of the 'restriction' to the choice of law in Article 3(3) and 3(4) on one side is not identical to the 'restriction' under Article 9 of the Regulation (in similar vein, Article 3(3) and 7 of the Rome Convention). The former present a 'restriction' to the party autonomy, whereas the latter limits the applicable law regardless of whether it is chosen by the parties or determined by an 'objective' conflict of law rule. Besides, the scope of the rules within the meaning of Article 9 is narrower than of those under Article 3(3) and 3(4). Finally, the circumstances of the *Ingmar* case do not reflect the situation described in Article 3(4) (i.e. that 'all' relevant elements are located within the EU). It is questionable whether the choice of the EU legislature to insert the express provision of paragraph 4 in Article 3 implies the intention to overrule the reasoning in the *Ingmar* case. Clearly, there is the room for different interpretations and consequently inconsistent application of the EU PIL rules.

1.3.4. Regulation Rome II (No. 864/2007)

Excluded matters (Article 1(2))

Most excluded matters are regulated in other EU instruments (such as, family matters and maintenance obligations, wills and successions) or are expected to be regulated in EU instruments (e.g. matrimonial property regimes, the property consequences of registered partnerships). Certain issues have been dealt with in other PIL conventions (e.g. bills of exchange, promissory notes and other negotiable instruments). For more particulars on these issues, see *supra* under Rome I.

The following issues have not been dealt with and can be thus qualified as 'gaps': legal capacity, the organisation or winding-up of companies, personal liability of officers, non-contractual obligations arising out of the relationships between the settlers, trustees and beneficiaries of a trust created voluntarily, non-contractual obligations arising out of nuclear damage, as well as non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

The review clause Article 30(1) provides that the Commission is to submit a report by 20 August 2011 to the European Parliament, the Council and the EESC on the application of the Regulation. The Report is to include a study on the effects of the way in which foreign law is treated in the different jurisdictions. Besides, it should also include a study concerning the Hague Convention of 4 May 1971 on the law applicable to traffic accidents. A study commissioned by the EU Commission on the application of foreign law in civil matters in the EU member states and its perspectives for the future, drawn up by the Swiss Institute of Comparative Law, was released in 2012. A consultation on the limitation period for compensation claims of cross-border road traffic accidents in the European Union has taken place in 2009 and is again taking place between 19 July and 19 November 2012. Article 30(2) further provides that the Commission is to submit a study on the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media. It would also include conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24th October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. References to a study dated February 2009 ('Comparative study on the situation in the 27 EU countries as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, JLS/2007/C4/028'), drawn up by an external contractor can be found on the Internet. At the

time of consultation, the text of this report could not be accessed properly through the link on the website of DG Justice.

Relation to other Conventions

Rome II regulates the relationship with other provisions of Community law in Article 27 in a similar way as it is defined under Article 23, Rome I (see *supra*). As to the relationship to other international conventions laying down the conflict of law rules for non-contractual obligations, Rome II does not claim precedence over such instruments (Article 28(1)). Yet, it does prevail over conventions concluded exclusively between two or more Member States insofar such conventions concern the matters governed by the Regulation.

The review clause

The review clause in Article 30 provides that the Commission is to submit a study on, *inter alia*, the obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media. To this end, the European Parliament has issued the Report of 2nd May 2012 with the recommendation to the Commission on the amendment of Regulation Rome II. Thereby the European Parliament has regarded, *inter alia*, the judgment in *eDate Advertising GmbH and Martinez* (Joined Cases C-509/09 and C-161/10), as well as a number of other ECJ judgments relating to non-contractual obligations involving international elements mainly related to the interpretation of jurisdictional rules under the Regulation Brussels I. Also, the reference is made to the comparative study commissioned by the Commission on the situation in the 27 Member States regarding the law applicable to non-contractual obligations arising out of violations of privacy and right relating to personality (JLS/2007/C4/-28, Final Report).

As to road accidents, the Commission has received the final report on a study on the compensation of victims of cross-border road traffic accidents in the EU. The Study consists of comparison of national practices, analysis of problems and evaluation of options for improving the position of cross-border victims (the study of 30th November 2008). Upon an invitation for public consultation of 31st March 2009, the Commission received the Feedback Statement Consultation on the Compensation of Victims of Cross-Border Road Traffic Accidents in the European Union on 7th October 2009. Another consultation is taking place between 19 July and 19 November 2012.

Application of foreign law

The review clause in Article 30(1) provides that the Commission is to submit a report to the European Parliament, the Council and the EESC on the application of the Regulation, including a study on the effects of the way in which foreign law is treated in the different jurisdictions. The Study on Foreign Law and its Perspectives for the Future at European level was submitted on 11 July, 2011, revised 30 September 2011 (LS/2009/JCIV/PR/0005/E4).

1.3.5. Maintenance Regulation (No. 4/2009)

The Maintenance Regulation (4/2009) is a comprehensive instrument that deals, in respect of maintenance, with all aspects of private international law and further also deals with judicial co-operation. The Regulation applies to Denmark only insofar as it amends Brussels I and the United Kingdom does not apply Chapter II of the Regulation, which provides that the applicable law to maintenance is to be determined by the Hague Protocol on the Law Applicable to Maintenance Obligations 2007.

A prominent novelty of the Regulation is that when a decision on maintenance is taken under application of unified choice of law rules (of the Hague Protocol 2007) it is no longer necessary to obtain a declaration for enforcement in case the decision is to be enforced in

another Member State. The guarantee that uniform choice of law rules have been applied means that the enforcement procedure has been simplified.

Another important facet of the Maintenance Regulation is that it confirms the relevance of the work within the framework of the Hague Conference and allows for the application of a Hague instrument (the 2007 Protocol), intended for worldwide application, within the European framework of private international law. The EU (with the exception of Denmark and the United Kingdom) also undertook to apply the Hague Protocol 2007 before this instrument entered into force as an international convention.

The Maintenance Regulation is a recent and comprehensive instrument. Gaps are hard to identify.

1.3.6. Regulation Rome III (No. 1259/2010)

Enhanced co-operation

The Rome III Regulation was the first legislative instrument created through enhanced co-operation. Currently 15 Member States are participating in the enhanced cooperation of Rome III. The choice of law rules of the Regulation are applied from 21 June 2012. On enhanced co-operation, and its consequences in the light of the example of Rome III, reference is made to Chapter 7.2 of this report.

Excluded matters

According to Article 1(2), the Rome III Regulation does not apply to the legal capacity of natural persons, the existence, validity or recognition of a marriage, the annulment of a marriage, the name of the spouses, the property consequences of the marriage, parental responsibility, maintenance obligations and trusts or successions. It is also explicitly stated that Regulation Rome III will not apply to these matters when they arise merely as a preliminary question within the context of divorce or legal separation proceedings.

The inference that can be drawn from Article 1(2), Rome III is twofold. Firstly, with respect to the method of private international law the provision says something about the problem of the incidental question. A typical example of the incidental question is when the paternity of a child that is supposedly born out of wedlock must be determined. The incidental question then is whether the marriage is valid. In an international case the additional problem arises how the applicable law to the incidental question must be determined. Sometimes the law that is applicable to the main question is also deemed applicable to the incidental question. The typical example is found in the choice of law rules on maintenance: the law that is applicable to the maintenance claim is also applicable to the incidental question of paternity that will arise when the maintenance debtor contests his paternity. In other circumstances it is assumed that the law applicable to the incidental question must be established independently and is not necessarily subject to the same law as the main question. Thus, when the validity of a marriage must be determined prior to a decision on matrimonial property, the law governing the validity is determined by the conflicts of law rule for marriage, not by the conflicts of law rule for matrimonial property. It would appear that Article 1(2), Rome III accepts that the incidental question is treated independently, with reference to separate choice of law rules.

Secondly, with respect to the gaps in the framework of private international law, it quickly transpires that a number of issues that Article 1(2) Rome III excludes are not yet regulated nor is there an expectation that they will be regulated in the near future. This is the case for legal capacity, all aspects relating to the existence, validity or recognition of marriage, the name of natural persons and trusts. In this context it seems useful to point out that Brussels II-bis is also applicable to proceedings on the annulment of a marriage, but that by its nature Brussels II-bis does not deal with the applicable law. As the choice of law rules of

Rome III only concern divorce and legal separation, the courts of a Member State will have to revert to national choice of law rules when dealing with the annulment of a marriage. Admittedly proceedings on annulment have become rare in modern times, but the recognition of marriages has become a source of disagreement since the opening of marriage to same-sex couples. It would appear that in annulment proceedings courts would apply the law that they also deem applicable to the validity and recognition of the marriage.

1.3.7. The Insolvency Regulation (No. 1346/2000)

The Insolvency Regulation is in force in all EU Member States except Denmark. According to recital 23, it ‘should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law.’ Thus, the law of the Member State where insolvency proceedings are opened (*lex concursus*) is applicable to all the effects of the insolvency proceedings, except for the exemptions mentioned in Articles 5 to 15. Some of these exceptions operate so as to limit the effect to the *lex concursus* (Articles 5-7). Others provide that certain legal relationships are to be governed by a law other than the *lex concursus* (Articles 8-15). Article 4(2) states that the conditions for opening insolvency proceedings, their conduct and closure will be determined by the law of the State where the insolvency proceedings are opened. The same provision contains a non-exclusive list of issues that are governed by the *lex concursus*. Thus, it will determine, *inter alia*, the effects of insolvency proceedings on the debtor’s current contracts and on proceedings brought by individual creditors, except for the pending lawsuits.

The Insolvency Regulation applies to collective insolvency proceedings that entail the partial or total divestment of a debtor and the appointment of a liquidator (i.e. ‘straight bankruptcy’ or bankruptcy liquidation). In principle it does not apply to insolvency procedure which provides for a reorganisation (or restructuring) of business. Although some of these proceedings are listed in the Regulation, it is not entirely clear to which extent they fall within its scope. Considering that the importance of such procedures has grown significantly in various legal systems, it may appear crucial that the companies may benefit from the recognition of such procedures throughout the EU.

As already briefly indicated in the context of the insolvency exception under Article 1(2)(b), Brussels I Regulation, the scope of application of the Insolvency Regulation needs to be clearly defined. In particular, it is highly relevant to determine which matters fall within the jurisdiction of the court where insolvency proceedings have been commenced for the purposes of the application of the Insolvency Regulation. It seems to follow from the relevant cases decided by the ECJ, that the conflict of law rules in Article 4 (and the exceptions to the applicability of *lex fori concursus* in Articles 5-15) cannot be applied analogously to determine the scope of jurisdiction of the court before which insolvency proceedings are pending (this conclusion seems to follow from *German Graphics v. van der Schee* (C-292/08)). Besides, the decisions of the ECJ seems sometimes to be contradictory with respect to the scope of application of the Regulation and the scope of jurisdiction of the court where insolvency proceedings are opened (see e.g. *Christofer Seagon v. Deco Marty Belgium NV* (C-339/07) on one side and *F-TEX SIA* (C-213/10) on the other).

Competent court to open insolvency proceeding

According to the Regulation, only the courts of the Member State where the debtor has the centre of its main interest (COMI) are competent to open main insolvency proceedings. In the absence of proof to the contrary, the COMI is presumed to be a registered office of a company or legal person (Article 3(1)). The concept of ‘COMI’ and its true meaning have often given rise to difficulties in application and interpretation (e.g. *Eurofood* (C-341-04) and *Interedil* (C-396/09)). More certainty and clarification with respect to the concept of COMI is needed. As already explained, it is of utmost importance to define clearly the scope of matters that fall within the jurisdiction of the court competent to open main insolvency

proceedings. This appears necessary in order to more appropriately address the problems of interpretation of the scope of application of the Insolvency Regulation and the Brussels I Regulation.

Appropriateness of the Conflict of Law Rules under Regulation (Controversial decisions in different EU Member States)

It is questionable whether the Insolvency Regulation's conflict of law rules provide for appropriate solutions in cross border insolvencies. Here is just an example illustrating a problem that may arise in the application and interpretation of conflict of law rules.

The decisions of English courts⁷ on one side and the decisions of the Austrian Supreme Court⁸ on the other, illustrate how the relevant provisions on conflict of laws contained in the Insolvency Regulation may be applied and interpreted differently in various EU Member States. These cases concern the application of Articles 4(2)(f) and 15 of the Insolvency Regulation. In *Mazur Media Ltd v. Mazur Media GmbH a national court, the High Court of England and Wales (EWHC)* dealt with the question whether English court proceedings were to be stayed following insolvency proceedings in the country of the debtor, which was Germany. Pending lawsuits were to be stayed under German insolvency law. The same is true according to the relevant provision of Article 130(2) of the 1986 English Insolvency Act. In relying on Article 15 of the Insolvency Regulation it was assumed that the question was to be answered as a matter of English law. The EWHC held, however, that Article 130(2) of the 1986 Insolvency Act was not to be applied in the case of foreign insolvency proceedings, reasoning, *inter alia*, as follows:

'(67) Accordingly section 130(2) can apply in the case of the winding up in England of a foreign company, but I am satisfied that there is no basis for an argument that section 130(2) can apply to a foreign insolvency proceeding.

(68) It is clear from its context that section 130(2) does not apply to foreign insolvency and section 221(1) does not extend it to foreign insolvency proceedings. Nor is there any basis for any argument that it could apply by analogy. Nor do I see any element of discrimination. The effect of Article 4(2)(e) and Article 15 of the Insolvency Regulation is to leave the question whether there should be a stay to the English court in the circumstances in which they apply.'

It is clear that the stay under Section 130(2) is an effect attributed to a domestic proceeding in England and, accordingly, is to be given to the proceedings opened in another Member State. The judgment in *Mazur Media* contravenes not only the Virgos-Schmit Report, but deviates from the understanding of this provision by the courts in other Member States, notably in Austria. In contrast, the Austrian Supreme Court rightly held that Article 15 Insolvency Regulation implies that the provision on the stay of judicial proceedings under Austrian insolvency law also apply when insolvency proceedings are opened abroad. According to the interpretation given by the Austrian courts, if a stay is imposed by the *lex fori processus* the proceedings would be stayed even if this does not follow from the *lex concursus*. Besides, the practical importance of the distinction may be minimal, considering

⁷ High Court of Justice, Queen's Bench Division, Commercial Court, *Syska v. Vivendi Universal SA et al* [2008] EWHC 2155 (Comm) (2 October 2008); Court of Appeal (Civil Division) Judgment of 9 July 2009, *Syska v. Vivendi Universal SA et al*, [2009] EWCA Civ 677. See also, *Mazur Media Ltd v. Mazur Media GmbH* [2004] EWHC 1566 (Ch).

⁸ Decisions of the Austrian Supreme Court of 17 March 2005 - 8 Ob 131/04d, 24 January 2006 10 Ob 80/05w and 23 February 2006, 9 Ob 135/04z.

that there is a wide acceptance of the principle of the preclusion of individual actions by creditors in the Member States.

Bankruptcy of groups of companies and the need for coordination between main and secondary proceedings are further issues that need to be addressed in the revised Insolvency Regulation.

1.3.8. European Enforcement Order Regulation (No. 805/2004)

Under the Brussels I Regulation (and its predecessor the 1968 Brussels Convention) a judgment from the court of a Member State can only be enforced in another Member State if the courts of the other Member State have issued a judgment that contains a declaration of enforceability.

Abolition of this so-called ‘*exequatur*’ procedure for uncontested claims was designated as a pilot project in the European Council’s Tampere Conclusions of 1999. The purpose was to create a European Enforcement Order for uncontested claims to permit the free circulation of judgments, court settlements and authentic instruments in all Member States without any intermediate proceedings to be initiated in the enforcing Member States, provided that minimum standards have been complied with (Article 1). It applies to uncontested claims in situations in which a creditor has obtained a court decision or other enforceable document that requires the debtor’s express consent, be it a court settlement or an authentic instrument (recital 5). Article 3 specifies when a claim is to be considered as uncontested. A judgment certified as a European enforcement order should for the enforcement purposes be treated as if it had been delivered in the Member State where the enforcement is sought. If a judgment is certified as a European enforcement order by the court of origin, it will be treated for enforcement purposes as if it had been delivered in the Member State of enforcement.

The scope of application is defined in Article 2(1) so as to closely reflect the substantive scope of application of the Brussels I Regulation. The purpose was to create an additional instrument for the enforcement parallel to the Brussels I Regulation, so that a creditor would be given a choice as to which instrument to rely on. Thus, in the wording similar to Article 1(1), Brussels I, it determines that the European Enforcement Order Regulation shall apply in civil and commercial matters, whatever the nature of the court or tribunal. In particular, it does not apply to revenue, customs or administrative matter or the liability of the State for acts or omissions in the exercise of State authority (*acta iure imperii*). In paragraph 2 the same issues as those in the Brussels I Regulation are excluded (personal status/family matters, insolvency, social security and arbitration). In that sense, the same line of argumentation as expressed in the context of the Brussels I Regulation on the possible gaps concerning the subject matter covered may also be applied in this context.

In principle it is irrelevant whether the court in the member state from which the decision originated applied the rules on international jurisdiction correctly. Thus, a judgment may be certified as a European Enforcement Order even if the court that rendered the judgment should not have assumed jurisdiction. The only exception to this point of departure is if the judgment conflicts with the jurisdictional rules in Sections 3 and 6 of Chapter II, Brussels I Regulation (relating to matters of insurance and exclusive jurisdiction in Article 22). Furthermore, in the case a consumer is a debtor a judgment may be certified as a European enforcement order only if a consumer debtor has been sued in the Member State of his or her domicile within the meaning of Article 59, Brussels I Regulation.

1.3.9. European Payment Order Regulation (No. 1896/2006)

In order to create a tool to accelerate the judicial proceedings, to make them simple and less expensive, as well as to generally facilitate the swift and efficient recovery of outstanding debts over which no legal controversy exists, the European Payment Order

Regulation was introduced (Article 1(1)(a)). Minimum standards were laid down, in particular those relating to the rules governing the service of documents, due to differences of rules of procedure in different Member States, in particular those governing the service of documents (Article 1(1)(b)). The compliance with such standards renders unnecessary any intermediate proceedings in the state where the enforcement is sought. Thus, the exequatur is abolished, i.e. there is no need for a declaration of enforceability in the country of the enforcement and no possibility to oppose the recognition of such a judgment. The procedure is to a large extent based on the use of standard forms in any communication between the court and the parties. This is an additional and optional means for the creditor to collect the debt due, whereby the possibility to resort to a procedure provided by national law remains unaffected (Article 1(2)).

The scope of application is defined along the lines of the scope in the Regulation Brussels I and the European Enforcement Order. The wording of Article 2(1) is identical to Article 2(1) of the European Enforcement Order. As to the matters expressly excluded, the Regulation does not apply to matrimonial property rights, wills and successions, insolvency, social security and claims arising from non-contractual obligations, unless they have the subject of an agreement between the parties or there has been an admission of debt or they relate to liquidated debts arising from joint ownership of property.

The jurisdictional rules under the Brussels I Regulation are used for the purposes of applying the European Enforcement Order, according to Article 6(1), European Enforcement Order Regulation. However, if the claim relates to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, and if the defendant is the consumer, only the courts in the Member State in which the defendant is domiciled, within the meaning of Article 59 of the Brussels I Regulation, shall have jurisdiction.

1.3.10. European Small Claims Procedure Regulation (No. 861/2007)

In order to simplify and speed up litigation concerning small claims cross-border cases and to reduce costs, the Regulation establishing a European Small Claims Procedure has been adopted. It applies to small claims, i.e. where the value of a claim does not exceed €2,000 at the moment when the claim form is received by the court. As the procedure under the European Payment Order, this procedure is an alternative to the proceedings existing under the internal laws of the Member States. Thus, the claimant may choose which procedure to utilise.

According to Article 20 and the Preamble (recital 30), a judgment rendered in a Member State in a small claims procedure should be recognised and enforced in another Member State without the need for a declaration of enforceability and without any possibility to oppose the enforcement. This equals the abolishment of exequatur. Yet in order to commence the enforcement, the court where the small claims procedure was conducted shall issue a certificate concerning a judgment by using the standard form (Article 20(2)). According to Article 22(1), the enforcement shall, upon application by the person against whom enforcement is sought, be refused by the court or tribunal with jurisdiction in the Member State of enforcement if the judgment given in the European Small Claims Procedure is irreconcilable with an earlier judgment given in any Member State or in a third country, provided that certain conditions are met.

The scope of application is defined along the lines of the scope in the Brussels I Regulation, the European Enforcement Order and the European Payment order. The wording of Article 2(1) is identical to Article 2(1) of the European Enforcement Order and of the European Payment order. As to the matters expressly excluded, the Regulation does not apply to the status or legal capacity of natural persons, matrimonial property rights, maintenance obligations, wills and successions, insolvency, social security, arbitration, employment law,

tenancies of immovable property, with the exception of actions on monetary claims and violation of privacy and of rights relating to personality, including defamation.

Both the European Payment Order and a European Small Claims Procedure contain the provisions defining ‘cross-border cases’ in Article 3 which are almost identical in wording. Thus, a cross-border case is one in which at least one of the parties is domiciled or habitually resident in a Member State other than the Member State of the court or tribunal seised (Article 3(1)). Domicile shall be determined in accordance with Articles 59 (containing a conflicts of law rule for natural persons) and 60 (autonomous definition for legal persons) of the Brussels I Regulation (Article 3(2), European Small Claims Procedure Regulation). The relevant moment for determining whether there is a cross-border case is the date on which the claim form is received by the court or tribunal with jurisdiction (Article 3(3) European Small Claims Procedure Regulation) or when the application for a European Payment Order is submitted in accordance with the Regulation (Article 3(4) European Payment Order Regulation). However, there is no definition of ‘habitual residence’ in either of the two Regulations. It may be appropriate to include a definition, as it has been done in some other EU PIL instruments (e.g. Article 19, Rome I; Article 23, Rome II). For the purposes of an enhanced consistency and coherence among different EU instruments, it may be appropriate to use similar approach in defining such ‘general concepts’. An EU PIL Code could then be a suitable solution.

Besides the issue of defining the habitual residence, it is not clear how a possible revision of the scope of the Brussels I Regulation would impact on these two instruments. In particular, if the territorial scope of application were to be extended or even be ‘universal’ or ‘unlimited’ with respect to jurisdictional rules. Currently, the application of the Brussels I Regulation is confined to the cases where a defendant has domicile in an EU Member State, except for those cases that fall within the scope of Articles 22 and 23 (exclusive jurisdiction and prorogation of jurisdiction). It is not clear whether such a change would trigger the need to revise these two instruments, in particular the provision defining the ‘cross-border cases’.

1.3.11. The Succession Regulation

The Succession Regulation excludes a large number of issues from its scope of application. Article 1(2) excludes the status of natural persons (including family relationships and comparable relationships), the legal capacity of natural persons, questions relating to the disappearance, absence or presumed death of a natural person, questions relating to matrimonial property regimes and property regimes of registered partners, maintenance obligations, the territorial validity of dispositions of property upon death made orally, property rights, interests and assets created or transferred otherwise than by succession, matters relating to the law of companies, the creation, administration and dissolution of trusts, the nature of rights *in rem* and all aspects related to the recording in a register of rights in immovable or movable property.

The extensive summing up in Article 1(2) of the Succession Regulation is instrumental for the identification of a number of issues that are not yet part of the European framework of private international law. Some issues excluded by the Succession Regulation are also excluded from the scope of other instruments (as is the case for status and legal capacity), others are expected to be regulated in forthcoming European regulations (matrimonial property, property of international couples).

The summing-up of issues excluded by the Succession Regulation also mentions issues that have not been identified by previous instruments. Most notably are the various exclusions made in respect of questions that relate to property rights, the nature of rights *in rem* and all aspects related to the recording in a register of rights in immovable or movable property. The exclusion of these questions of property law was unnecessary in the earlier instruments on applicable law Rome I and II, as property law is considered distinct from the law on contractual or extra-contractual obligations.

The detailed exclusions in Article 1(2) under (g), (j), (k) and (l), for questions relating to property and to trust immediately point to gaps in the current framework:

- property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, joint ownership with a right of survivorship, pension plans, insurance contracts and arrangements of a similar nature;
- the creation, administration and dissolution of trusts;
- the nature of rights *in rem*;
- any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.

The Succession Regulation had to deal with these exclusions as it was understood that succession concerns the transfer of property.

1.4. Exception to the scope of relevant Hague Conventions

EU legislation now integrates three Hague Conventions. The scope of these instruments appears not to create problems. It is not possible to speak of gaps that have been left deliberately in these instruments. It is evident that by their nature these instruments only seek to regulate a specific part of the law. They have not been intended to be integrated in yet another instrument of a more general nature, such as a code. Nevertheless there is a fair amount of coherence between the modern day products of the Hague Conference.

Article 4 of the 1996 Convention on protection of children states a number of issues to which this convention does not apply. The issues that are excluded are mainly issues that are regulated in other conventions or that systematically are considered not an issue of child protection: paternity, adoption, name, emancipation, maintenance, trusts or succession. Other excluded issues are not generally considered issues of private law: social security, public measures of a general nature in respect of education or health, measures as result of penal offences committed by children, decisions on the right of asylum and on immigration.

The 1980 Hague Child Abduction Convention simply states the object of the convention in Article 1 (simply put: the return of children wrongfully removed or retained) and defines the concept of wrongful removal or retention in Article 3.

The 1997 Protocol on the Law applicable to Maintenance Obligations is applicable to maintenance obligations arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child regardless of the marital status of the parents (Article 1(1)).

1.5. Citizenship of the Union

1.5.1. ECJ case law relevant for (cross) border private law issues

The legal concept of citizenship of the Union has, within the ambit of international family law, in ECJ case law been linked to surnames. The following is a brief summary of the most relevant cases.

In *Garcia Avello* (C-148/02) citizenship of the Union was linked by the Court to the principle of equal treatment of Article 12 EC Treaty. The case concerned two children born and living in Belgium, with a Spanish father (Garcia Avello) and a Belgian mother (Weber). The two children held dual Belgian and Spanish nationality. Under Belgian law, children take the surname of their father, whereas under Spanish law children take the first surname of each of their parents. The Belgian Registrar of Births, Marriages and Deaths entered on the children's birth certificates the patronymic surname of their father: Garcia Avello. However, the children were registered under the family name "Garcia Weber" with the consular

section of the Spanish Embassy in Belgium. The Belgian authorities rejected the application of the parents to change the children’s surname from Garcia Avello into Garcia Weber. The European Court stated that surnames in this case came within the scope of Community law, since the children were nationals of one Member State and were lawfully resident in the territory of another Member State. Both children had the status of citizen of the Union. Although the children themselves did not move from one Member State to another (as their father had done), this case was, according to the Court, not an internal case of Belgian law. The Court then went on to state that “nationals of one Member State who are lawfully resident in the territory of another Member State may rely on the right set out in Article 12 EC not to suffer discrimination on grounds of nationality in regard to the rules governing their surname”.

The Court ruled (45):

“(that) Articles 12 EC and 17 EC must be construed as precluding, in circumstances such as those of the case in the main proceedings, the administrative authority of a Member State from refusing to grant an application for a change of surname made on behalf of minor children resident in that State and having dual nationality of that State and of another Member State, in the case where the purpose of that application is to enable those children to bear the surname to which they are entitled according to the law and tradition of the second Member State.”

In *Garcia Avello* (C-148/02) the Court accordingly reiterated a crucial consideration derived from the earlier *Grzelczyk* case (C-184/99) with regard to the connection between the non-discrimination principle and the rules regarding the citizenship of the Union. As in that case, the Court characterised the citizenship of the Union as “the fundamental status of nationals of Member-States”. But *Garcia Avello* (C-148/02) could apparently also be ‘solved’ without delving into the aspects of private international law as such. The Court did not enter into a discussion of the question concerning the effective nationality in case of dual nationality, for example. Moreover, it did not matter which national law was applied, as long as there was no discrimination on the grounds of nationality, given the ulterior aim that children of dual nationality of two member States be enabled to have the surname in accordance with the law of one of these Member States.

In *Grunkin Paul* (C-353/06) the case revolved around the birth certificate of a German boy, born in Denmark to German nationals then married and living in Denmark, while the surname of the child, according to Danish law, was Grunkin (surname of the father) Paul (surname of the mother). The German registry office refused to recognise the surname of the child. According to German private international law the surname of a person has to be determined by the law of the State of his or her nationality, and that German law does not allow a child to bear a double-barrelled surname composed of the surnames of both the father and mother. The German authorities posed the question to the court whether regarding the right to the freedom of movement for every citizen of the Union in Article 18 EC Treaty, the German provision on the conflict of laws regarding the surname is valid, in so far as it provides that the law relating to names is governed by nationality alone. In this case there was no conflict with Article 12 (non-discrimination) since the child and his parents only held German nationality so that the determination of the child’s surname in Germany in accordance with German law could not constitute discrimination on grounds of nationality.

Regarding Article 18 the Court ruled (39):

“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.”

An outcome of this case is that the surname given in one Member State where the child is born and living since birth, must be recognised in the Member State of the nationality of the child.

In *Sayn-Wittgenstein/Von Wien* (C-208/09) the facts were the following:

An Austrian woman was adopted in Germany by a German citizen, Mr Lothar Fürst von Sayn-Wittgenstein. As a consequence of her adoption, she obtained his surname as her name at birth: Ilonka Fürstin von Sayn-Wittgenstein. This name was mentioned in her German driving licence and in other documents. At first, the Austrian authorities accepted this new surname. However, following the judgment of the Constitutional Court regarding the Austrian law on the abolition of the nobility, which has constitutional status and implements the principle of equal treatment in this field, the authorities in Vienna were of the opinion that the birth certificate of the woman was incorrect. The Austrian authorities posed the question to the court whether Article 21 TFEU precludes legislation pursuant to which the competent authorities of a Member State refuse to recognise the surname of an (adult) adoptee, determined in another Member State, in so far as it contains a title of nobility which is not permissible under the (constitutional) law of the former Member State.

The Court held that the rules governing a person's surname and the use of titles of nobility are matters coming within the competence of the Member States, but that those national rules must comply with European Union law. Furthermore, the court submitted that in case different documents hold different surnames, this may entail confusion regarding a person's identity. This could result in a restriction on the freedom of movement conferred by Article 21 TFEU on every citizen of the Union. However, in the eyes of the court, an obstacle to the freedom of movement of persons could be justified where it was based on objective considerations and was proportionate to the legitimate objective of the national provisions. The Austrian law regarding the abolition of the nobility could be considered to respect the principle of equal treatment, an element of national identity, and a part of the public policy. The Court took the view that it was not disproportionate for a Member State to seek to attain the objective of protecting the principle of equal treatment by prohibiting any acquisition, possession or use, by its nationals, of titles of nobility or noble elements.

The Court ruled (dictum):

"Article 21 TFEU must be interpreted as not precluding the authorities of a Member State, in circumstances such as those in the main proceedings, from refusing to recognise all the elements of the surname of a national of that State, as determined in another Member State – in which that national resides – at the time of his or her adoption as an adult by a national of that other Member State, where that surname includes a title of nobility which is not permitted in the first Member State under its constitutional law, provided that the measures adopted by those authorities in that context are justified on public policy grounds, that is to say, they are necessary for the protection of the interests which they are intended to secure and are proportionate to the legitimate aim pursued."

In *Runevič- Vardyn* (C-391/09) the case involved a request from Mrs Runevič-Vardyn, a Lithuanian national belonging to the Polish minority in Lithuania, and her husband, a Polish national. Mrs Runevič wanted her name to be spelt using the Polish alphabet. She stated that her parents had given her names according to the Polish alphabet, but that a birth certificate and her passport issued by the Lithuanian authorities showed her forename and her surname according to the Lithuanian alphabet. In Vilnius, in 2007, she got married to a Polish citizen, after having lived and worked in Poland for some time. The marriage certificate issued by the Registrar in Vilnius, shows both her husband's name as well as her name in Lithuanian alphabet. Since the Lithuanian alphabet does not have the character W, her husband's surname Wardyn was spelt as Vardyn. Furthermore, the name of the husband was entered in the marriage certificate not using the diacritical modifications, since these are not used in the Lithuanian language. The woman, her husband and their child

live in Belgium. Four questions were posed to the ECJ, two of them referring to article 18 TFEU (non-discrimination) and 21 TFEU (free movement). The Court pointed out that when a citizen of the Union moves to another Member State and later marries a national of that Member State, the fact that in the Member State of origin, the surname of that citizen cannot be changed and mentioned in documents relating to her civil status in a language other than in the language of this state, this does not constitute treatment that is less favourable than which was enjoyed before she availed herself of the right of free movement. Therefore the Lithuanian law did not constitute a restriction on her free movement rights.

Regarding the marriage certificate the Court held that the refusal to amend the joint surname did not constitute a restriction of the freedoms, unless this causes ‘serious inconvenience’ to those concerned at administrative, professional and private levels. It is for the national court to decide whether there is a real risk, that there will be doubts as to the identity of the persons and the authenticity of the documents. If this is the case and there is serious inconvenience to those concerned, then there is a restriction on the freedoms of Article 21 TFEU. The next step is to determine whether this restriction can be justified, which must be based on objective considerations and the legitimate objective of the national provisions. The Union must respect the national identity of its Member States, which includes the protection of the national languages. Regard must be had to the rights of those concerned regarding their private and family life at the one hand and at the other hand the protection of the Member State of its national identity.

The Court ruled (regarding Article 21):

“Article 21 TFEU must be interpreted as:

– not precluding the competent authorities of a Member State from refusing, pursuant to national rules which provide that a person’s surnames and forenames may be entered on the certificates of civil status of that State only in a form which complies with the rules governing the spelling of the official national language, to amend, on the birth certificate and marriage certificate of one of its nationals, the surname and forename of that person in accordance with the spelling rules of another Member State;

– not precluding the competent authorities of a Member State from refusing, in circumstances such as those at issue in the main proceedings and pursuant to those same rules, to amend the joint surname of a married couple who are citizens of the Union, as it appears on the certificates of civil status issued by the Member State of origin of one of those citizens, in a form which complies with the spelling rules of that latter State, on condition that that refusal does not give rise, for those Union citizens, to serious inconvenience at administrative, professional and private levels, this being a matter which it is for the national court to decide. If that proves to be the case, it is also for that court to determine whether the refusal to make the amendment is necessary for the protection of the interests which the national rules are designed to secure and is proportionate to the legitimate aim pursued;

– not precluding the competent authorities of a Member State from refusing, in circumstances such as those at issue in the main proceedings and pursuant to those same rules, to amend the marriage certificate of a citizen of the Union who is a national of another Member State in such a way that the forenames of that citizen are entered on that certificate with diacritical marks as they were entered on the certificates of civil status issued by his Member State of origin and in a form which complies with the rules governing the spelling of the official national language of that latter State.”

In these four cases the Court refers to the “serious inconvenience test” with regard to the difference in treatment regarding surnames and free movement in the context of the

citizenship of the European Union⁹. In *Garcia Avello* (C-148/02) the Court pointed out that the difference in surnames may cause serious inconvenience for the children involved, as it did in the case in *Grunkin Paul* (C-353/06) as a result of the boy having different surnames. In the case of *Sayn-Wittgenstein* (C-208/09) the Court rules, that although as a consequence of the different documents, she was restricted in her free movement, this restriction was regarded as not unjustifiable undermining her freedom to move. In *Runevič-Vardyn* (C-391/09) the Court left it to the discretion of the national court to perform the "serious inconvenience test".

1.5.2. Other areas of European private international law connected to Union citizenship

Nationality law: the principle of proportionality

As far as we know, nationality law is not considered to be part of private international law in most legal systems. The conflict of nationality may be a grey area. In France nationality law is discussed in PIL handbooks, and some scholars are active in both PIL and nationality law. Although nationality law shall hereafter not be regarded as a (core) area of PIL either, the frequent application of the principle of nationality in private international law means that there is an undeniable link between nationality law and PIL. Cases in which citizens sought to lay claim to rights linked to EU citizenship through their dual nationality include *Micheletti* (C-369/90), *Garcia Avello* (C-148/02) and *McCarthy* (C-434/09).

In the *Rottmann* case (C-135/08) the Court brought national rules governing nationality law into the material scope of EU citizenship. The Court had been asked to decide on the question whether EU law allows for the loss of Union citizenship as a result of the loss of the nationality of one Member State (Germany) in the event of tax evasion and the concomitant loss of the nationality of another Member State (Austria). The Court ruled that it is not (necessarily) contrary to EU law for a Member State to withdraw from a citizen of the Union the nationality of that State acquired by naturalisation when that nationality was obtained by a citizen by deception, inasmuch as the decision to withdraw nationality observes the principle of proportionality (Bariatti, Cases and materials on EU private international law, p. 246). Accordingly, the Court insisted that a proportionality test in such cases is warranted that should be based on criteria such as suitability (the public interest aim should be pursued through adequate means), necessity (no less restrictive measure should be available) and proportionality *stricto sensu* (the disadvantage imposed on the individual must not be disproportionate to the importance of the aim) (see also on this case Savino: "EU-citizenship: post-national or post-nationalist? Revisiting the Rottmann case through Administrative Lenses", ERPL/REDP, vol.23, p.8).

Third country nationals (TCNs) with minor children who are EU citizens: the principle of effectiveness

In *Ruiz Zambrano* (C-34/09) the Court affirmed that a third country national (TCN), a (Colombian) father of two minors who were able to gain Belgian nationality because of the combined effects of Belgian nationality law (geared towards the prevention of statelessness) and Colombian nationality law (requiring registration after birth), could rely on Article 20 TFEU for a right of residence 'in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen' and could obtain a work permit in the Member State (Belgium) of which country his minor children (unlike their Colombian father) held nationality.

It has been recognised that this decision may have considerable implications for EU law and for the construction of Union citizenship, and for those EU citizens who have not availed

⁹ See the comments of Van Eijken, Common Market Law Review 2012, p. 810-826.

themselves of the migratory rights¹⁰. Conceivably, this decision also has implications for European private international law, having regard to possibly divergent interpretations in the various jurisdictions of the Member States of the legal definition of family law relationships. A German civil status registrar shall refuse, for example, to draw up an acknowledgment of paternity when it is obvious that the acknowledgement is done solely with the aim to grant one of the parties involved a right of residence in Germany (Article 44 *Personenstandgesetz*). Another example, under French and Italian law, involves the acknowledgment of paternity; in countries such as France and Italy the legal paternity of the acknowledger is established even if the mother of the child does not consent to the acknowledgment. Under Dutch law the acknowledgment is only valid if the mother of the child consents. French and Italian law provide that the acknowledgment of paternity is governed by the national law of the acknowledger. That means that the man who wants to acknowledge his paternity shall be treated differently according to whether he is French or, let’s say, Dutch. Furthermore, if Dutch commissioning parents enter into a surrogacy contract with an English mother and have their (genetic) child registered in England, they will still not be recognised as the legal parents in the Netherlands¹¹.

In the subsequent case of *McCarthy* (C-434/09) the Court detracted somewhat from the potentially extensive implications of *Ruiz Zambrano* (C-34/09), however, in affirming that a British citizen who had never been employed and who had also acquired Irish nationality, could not rely on the nationality of the other Member State (Ireland), where she had never lived, with the sole and clear aim of enabling her spouse, a Jamaican national, to obtain lawful residence in the UK.

In applying the *Ruiz Zambrano*-test of ‘genuine enjoyment of the substance’ of citizenship rights, the Court further stated in *Dereci* (C-256/11) that the mere fact that it might appear desirable to a national of a Member State, for economic reasons or in order to keep his family together in the territory of the Union, for the members of his family who do not have nationality of a Member State to be able to reside with him in the territory of the Union, do not provide sufficient reasons as such to support the view that the Union citizen will be forced to leave Union territory if such a right is not granted. However, the court did not clarify the scope of residence rights of TCNs to a further extent.

At present, according to the authors Ankersmit and Geursen it remains circumspect, ‘in the aftermath of *Ruiz Zambrano*’ (C-34/09), what the exact scope is of ‘citizenship rights’ in the context of the freedom of movement and TCNs.¹² It may be expected, according to these authors, that the Court will in the foreseeable future also consider certain fundamental rights to be derived (directly) from EU citizenship. The implications for private international law in this area of law connected to Union citizenship have in our eyes so far not acquired sufficient definition in the case-law or in substantive EU law, so that we do not deem it necessary to expand on them here.

Equal treatment and education

In the sphere of citizenship rights to education, Member States are obliged to create certain conditions for children of workers (Article 12 of Regulation 1612/68) to be admitted to the other Member State’s educational, apprenticeship or vocational training courses. Conceivably, this raise preliminary questions of legal parentage.

In the *Ibrahim* case (C-310/08) the Court concluded, for example, that the children of a national of a Member State (Denmark), who worked in the host Member State (UK), and the TCN parent who was the primary carer could claim a right of residence in the UK on the sole basis of Article 12, without such a right being conditional on having sufficient resources and

¹⁰ See Mei/Van den Bogaert/De Groot: De arresten Ruiz Zambrano en McCarthy, NtER 2011, p.188.

¹¹ See more examples in Saarloos, European private international law on legal parentage?, 2010.

¹² See Ankersmit/Geursen, “Ruiz Zambrano: de interne situatie voorbij”, *Asiel & migrantenrecht* 2011, p.164,

sickness insurance cover in that State. The parental status or family law relationship was not further dealt with, but just tacitly assumed by the Court.

In a case analogous to *Ibrahim* (C-310/08), in *Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Development* (C-480/08) the Court affirmed that Article 12 of the Regulation allows the child of a migrant worker to have an independent right of residence in connection with the right of access to education in the host Member State. The Court further concluded that the right of residence of the parent who is the primary carer for a child of a migrant worker, where that child is in education in the host Member State, does not end until the child reaches the age of majority, unless the child continues to need the presence and care of that parent in order to be able to pursue and complete his or her education. Again, the family law relationship and parental authority were not discussed as a preliminary issue, but just assumed.

Social advantages and taxes

Martínez Sala (C-85/96) was the first genuine case on equal treatment in respect of social advantages decided under Article 21 (1) TFEU. The German authorities had refused a Spanish woman (born 1956) who had lived in Germany from the age of twelve, a child-raising allowance on the grounds that she was neither a German national nor did she have a residence permit. The Court concluded that she suffered from direct discrimination on the basis of Article 18 and 20 (2) TFEU, although she was not a worker. In *Trojani* (C-456/02) the Court also concluded that the principle of equal treatment laid down in Article 18 TFEU had been violated in a case which concerned a French national who had been denied the Belgian minimum income guarantee because his economic activities fell short of enabling him to qualify as a worker in the meaning of Regulation 1612/68.

Student finance was at issue in *Grzelczyk* (C-184/99), *Bidar* (C-209/03) and *D'Hoop* (C-224/98). In a nutshell, the Court accepted the view in these cases that Member States have to show a degree of financial solidarity with nationals of other Member States, but that the Member State may nonetheless decide to grant financial assistance only to students who have demonstrated a degree of integration into the society of the other Member State. This level of integration in the other Member State will typically be shown to have been fulfilled through a period of residence with a threshold of three-year residence in the other Member State¹³. This area of law that has been linked repeatedly to the legal concept of Citizenship of the Union by the ECJ, has, however, in our view hitherto, not raised substantial problems of PIL.

Other areas of family law. The principle of mutual recognition and fundamental rights

Marriage has not been brought directly into with the sphere of the legal concept of EU citizenship so far. It cannot be excluded that in future the relation between recognition of marriages and the EU citizenship will be addressed in case law of the CJEU. Such caselaw may have a similar impact on the development of the private international law rules on recognition of marriages as the case law in respect of the name. In view of the unanimity that is necessary for EU legislation in family law matters it is thought that the only realistic option to move forward in this area for the EU legislature would at present be a form of enhanced co-operation. On the pros and cons of enhanced co-operation in the area of private international law reference is made to the discussion hereunder.

Likewise, the establishment of legal parentage and its recognition has not been brought directly into the legal sphere of EU citizenship rights. Nonetheless, it is worth observing that parentage may engage major preliminary questions in cases of maintenance and visitation rights.

¹³ See further Barnard, *The Substantive Law of the EU-The Four Freedoms*, 2010, p.446.

Moreover, it has been acknowledged in a Spanish/German divorce case involving parental authority and visitation rights, 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 had been wrongfully removed, on the ground that the court of the Member State of origin which handed down that judgment had infringed Article 42 Brussels II-bis, interpreted in accordance with Article 24 of the Charter of Fundamental Rights of the European Union, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin (case of *Aguirre/Pelz*, C-491/10). By contrast, in the recent case *N. S.* (Case C-411/10) concerning transfers of an Afghan asylum seekers to Greece, the Court made a caveat to the principle of mutual recognition and trust in relation to the principles of the Dublin agreement, given the risks posed to the fundamental rights of the asylum seekers if they were to return to Greece, the EU Member State they had entered first.

Union citizenship and the framework

In none of the aforementioned cases, the Court apparently sees any compelling reason to refer to principles of (European or national) private international law in order to solve the legal problems in the given case as it arose. This may come as a surprise for the practitioner of national private international law who is used to deal with preliminary issues of private international law such as the recognition in the domestic legal order of foreign names, marriages and legal parentage. The Court has however, apparently, not found any compelling reason to frame such legal issues as preliminary questions of ‘traditional’ or ‘classical’ legal concepts of (domestic) private international law (for example the Court did not decide into the preliminary question whether family law relationship existed in the first place in the *Ibrahim* (C-310/08) and *Maria Teixeira* (C-480/08) or *Ruiz Zambrano* (C-34/09) case and whether it should be recognised) but has instead relied on other ‘broader’ legal concepts of European Union law, such as the aforementioned ‘serious inconvenience test’ and the realisation of the freedoms. In the area of the law of names, the Court has also remained silent on preliminary issues of private international law. This suggests that the instruments of domestic private international law are reconcilable with EU law, inasmuch as they do not conflict with the rights associated with citizenship. Accordingly, the main focus of the Court has consistently been on the desired outcome, for example, the exercise of the ‘genuine enjoyment’ of Union citizenship (*Ruiz Zambrano*, C-34/09). In other cases, which are more marginally connected to private international law, the Court drew on the principle of proportionality (*Rottmann*, C-135/08) and dispensed with a review of the underlying substantive principles of domestic nationality law. Furthermore, in other areas connected to citizenship but not directly to private international law, such as the attribution of certain social security advantages, the Court has hitherto also relied instead on the realization of a principle of equal treatment in the case as it arose (compare, for example, *Martínez Sala*, C-85/96).

1.6. The systematic structure of private international law

1.6.1. The traditional analysis of private international law

Legal writing

The analysis of private international law is characterized by a structured approach. Although national private international law systems differ, the main elements of this approach have found acceptance in many jurisdictions. On the other hand the doctrine of private international law is still occupied with questions as what is the proper basis for a rule on private international law. An example is the principle that should be at the heart of a choice of law rule, should it designate the law that is closest connected to the case, should it protect certain interests or should it direct to the *lex fori*? Nevertheless, over the course of years a certain structure has been developed. Textbooks of private international law will usually contain a discussion of general principles of private international law, such as *renvoi*,

classification or the preliminary question. In addition the rules relevant for various types of legal relationships will be discussed. Sometimes such discussion in respect of the various types of legal relationships will only deal with the choice of law rules, but nowadays such discussion will usually also deal with jurisdiction and recognition and enforcement, as there will often be specific rules in respect of a particular legal relationship. The textbook will also contain a general discussion of jurisdiction and recognition and enforcement (general principles).

Structures found in the work of the Hague Conference

Since 1893 the Hague Conference on Private International Law has developed conventions in areas ranging from the international protection of children, family and property relations, international co-operation and litigation to international commercial and finance law. The Hague Conference has 72 members. Accordingly, very significant attempts have been made to reduce the number of issues on which the rules for choice of law in different countries may conflict.

From 1951 to 2005 the Conference adopted 36 international Conventions. The most widely ratified Conventions deal with the abolition of legalisation, service of process, taking evidence abroad, access to justice, international child abduction, intercountry adoption, conflicts of laws relating to the form of testamentary dispositions, maintenance obligations and recognition of divorces.

Some of the Hague Conventions deal with the determination of the applicable law, while others deal with the conflict of jurisdictions, with the recognition and enforcement of foreign judgments or with administrative and judicial co-operation between authorities, or a combination of one or more of these aspects of private international law (Source: www.hcch.net).

The structure that is witnessed in the traditional analysis of private international law, where problems are divided into classification categories, is also very much present in the achievements of the Hague Conference. Conventions of the Hague Conference on applicable law typically deal with a specific category.

Gaps identified by the Hague Conference

A review of some of the most recent activities of the Conference can be accessed through the link http://www.hcch.net/upload/wop/gap2012concl_en.pdf.

As such, the Council on General Affairs has called on the Permanent Bureau to further prepare and distribute a Questionnaire in order to obtain more detailed information regarding the extent and nature of the private international law issues being encountered in relation to international surrogacy arrangements, as well as in relation to legal parentage in a broader sense.

The Council acknowledged that the desirability and feasibility of making provisions in relation to matters of jurisdiction (including parallel proceedings) requires further study and discussion.

More generally, the Council invited the Permanent Bureau to continue to follow developments in the following areas:

- a) questions of private international law raised by the information society, including electronic commerce, e-justice and data protection;
- b) jurisdiction, and recognition and enforcement of decisions in matters of succession upon death;

c) jurisdiction, applicable law, and recognition and enforcement of judgments in respect of unmarried couples;

d) conflict of laws issues relating to the enforceability of close-out netting provisions, taking into account in particular the work undertaken by other international organisations.

During the meeting of experts it was suggested that revision of the Hague Agency Convention would be a viable solution to address the void that exists as a consequence of the exclusion of agency contracts under the Rome I Regulation. Some experts also advocated the ratification of the Hague Trust Convention by all EU Member States.

1.7. Gaps that exist within the framework

1.7.1. Gaps identified on the basis of the scope of the current framework

Geographical scope of Brussels I

Regulation Brussels I does not deal with jurisdiction in respect of defendants domiciled in third states. Nor does the regulation deal with the recognition or enforcement of judgments of authentic instruments from third states. It is understood that these 'gaps' will be maintained after the revision of Brussels I. Since Brussels I, or rather its predecessor the Brussels Convention was conceived as a 'traité double' between European states on both jurisdiction and mutual recognition and enforcement, one could argue that this 'gap' is inherent to the chosen structure.

Coordination problems between Brussels I and the Insolvency Regulation

Some gaps identified above in respect of Brussels I appear to lead mainly to problems of coordination between Brussels I and the Insolvency Regulation.

Status and legal capacity and arbitration

Most issues that have always been excluded from Brussels I are matters pertaining to family law or to succession that are now or will in the future be regulated in other regulations. The main exceptions that will continue to exist are 'the status or legal capacity of natural persons' (with the exception of the 'status' problems of divorce and parental responsibility, found in Brussels II-bis) and arbitration.

Residual (national) jurisdiction rules

In respect of civil and commercial cases (Brussels I) it is a well accepted fact that national jurisdiction law will determine jurisdiction in respect of a defendant domiciled in a third state. In respect of status (divorce) there is a lack of clarity in respect of the role of residual, national rules on jurisdiction.

Negotiable instruments

The exception for negotiable instruments in Rome I and Rome II may still require clarification. The problem is not the exclusion of bills of exchange and cheques. Specialized conventions are applied in the Continental Member States and the common law Member States have always followed a different approach. The problem is what other instruments are meant by the last part of the exclusion, which refers to 'other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character'. Preamble (9) of Regulation Rome I states that bills of lading, which are mainly used in transport of goods by sea, should be understood as being such 'other negotiable instruments'. It is not excluded that the root of the problem is misinterpretation of the common law concept of 'negotiable instrument'. Traditionally the common law accepts

many other instruments relating to the payment of money, other than bills of exchange or cheques, e.g. bearer bonds, which are all classified as negotiable instruments.¹⁴ It does not appear, however, that at this stage action of the legislature is necessary to address this issue. It appears to be a matter of interpretation which may be solved after reference to the CJEU for a preliminary ruling.

Nuclear damage

Nuclear damage is still excluded from Rome II and it is believed that it is not sufficiently covered by other instruments. In this particular matter, the conflict of laws regime is not harmonised and, therefore, each Member State applies its conflict of laws rule. On the contrary, other types of environmental damage are included within the scope of Rome II and governed by a special provision favourable to the person sustaining the damage (see Article 7 and recital 25). It is true that international conventions are in force specifically dealing with civil nuclear liability, such as the 1960 Paris Convention¹⁵ and the 1963 Vienna Convention¹⁶. The 1960 Paris Convention has been ratified by all Member State except Austria, Luxembourg and Ireland. The 1963 Vienna Convention has only been ratified by some Member States. Both conventions are inspired by the same principle. They establish exclusive jurisdiction in favour of the courts of the Contracting State where the nuclear incident occurs. They also harmonise certain substantive law issues and establish a ceiling for the potential liability of the operator. However, other issues such as nature, form and extend of compensation are not harmonized and are governed by the national law of the court having jurisdiction (see, for example, Articles 11 and 14(b), 1960 Paris Convention). The vast majority of legal scholars interpret this reference to national law as including the choice-of-law provisions of the *lex fori*. Thus, since the Rome II Regulation has not laid down uniform conflict rules on this matter, the national conflict rules of the competent authority would govern those non-harmonised issues. Each forum will apply its own conflict of laws rules and, therefore, the conflict of laws regime may vary among Member States depending on where the nuclear incident occurs. Another problem is that the wording of the exclusion as drafted in the Rome II Regulation raises a problem of interpretation itself: it may go far beyond the cases governed by those conventions, since it includes all damages causes by radioactive materials used in hospitals, schools or for scientific purposes.

Application of foreign law

This gap is specifically mentioned in Rome II. The function of choice of rules is, ultimately, that a court may find that foreign law is applicable. Application of foreign law, even from another Member State, and even when this Member State shares the same language (e.g. Germany and Austria) can place a heavy burden on the courts. Approaches within the Member States also appear to vary as to who is to find the relevant information on foreign law, the courts on its own motion or the parties in the proceedings.

1.7.2. Gaps identified on the basis of the systematic structure of private international law

A number of traditional elements of the system of private international law are not yet covered by EU legislation.

Law of property

The European framework does not contain choice of law rules in respect of property. Brussels I does deal with jurisdiction and recognition and enforcement in this area. Property law is already mentioned in some detail in Article 1(2), Succession Regulation. Choice of law

¹⁴ See for a discussion of the various classes of negotiable instruments in English law, Goode, Commercial Law, 3rd edition, p. 477.

¹⁵ Paris Convention of 29th July 1960 on Third Party Liability in the Field of Nuclear Energy.

¹⁶ Vienna Convention of 21st May 1963 on Civil Liability for Nuclear Damage.

rules on property would deal with property rights over movables and immovable, the creation of security rights, the recording of rights in a registry for immovable or movable property and the nature of rights in rem.

Trust

Trust is a figure of the common law (it is sometimes thought that some Continental legal systems have or are developing alternatives for the trust). The basic function of the trust is that one person holds property (the trustee) for the benefit of another (the beneficiary). Problems from the perspective of private international law will arise whenever one of the persons involved (trustee or beneficiary) is domiciled outside a common law jurisdiction or when the property is located outside a common law jurisdiction.

Agency

Agency leads to legal relationships between three parties: the agent, the principal and the third party who entered into a legal relationship, e.g. a contract, with the agent. The 1978 Hague Agency Convention contains rules on both the internal relation (between agent and principal) and the external relation (between agent and third party). The question whether an agent is able to bind a principal is excluded from Rome I (Article 1(2)(g)).

Marriage

Marriage leads to various questions of private international law. It is not only a matter of recognition of marriages concluded in another jurisdiction, but also the conditions that must be fulfilled before spouses may marry and the authority competent to celebrate the marriage. Marriage between couples of the same-sex has recently drawn much attention as from the theoretical perspective it raises the question how private international law should deal with this new phenomenon. Yet, the recognition of marriages concluded abroad may also be relevant for other EU policy areas, such as immigration. In the latter case the problem will probably focus on marriages concluded in third states.

Interspousal relations

Interspousal relations are those legal relations of a personal nature between spouses that do not concern the matrimonial property and do not directly concern the validity of the marital bond. Classic examples that are found in the national legal systems are duties to be faithful towards each other and to support one another. In practice the question of the law that is applicable to interspousal relations becomes an issue when one of the spouses has contracted with a third party. Thus, under Netherlands internal law (Articles 88 and 89 Book 1 Netherlands Civil Code), certain transactions, such as the disposal of the marital home, require the consent of the other spouse. In the absence of consent, the transaction is voidable by action of the other spouse. Comparable although not identical restrictions can be found in the law of other Member States (e.g. Article 1365 German Civil Code; Article 1682A Portuguese Civil Code). Such provisions may lead to complications in cross-border situations, when the transaction that is voidable involved a party from another jurisdiction unaware of the requirement of consent.

Corporations (including the transfer of a statutory seat)

Reference can be made to the many decisions of the CJEU on the transfer of a statutory seat. It should be noted that the intention to regulate this area of law has already been expressed in the 1957 Rome Treaty.

Name of natural persons

The name of natural persons has been the subject of various decisions of the CJEU. Although these decisions are primarily related to issues of EU citizenship, it must be emphasised that these cases also comprise a cross-border element. It appears possible to argue that in respect of a person's name considerations of general policy and the interests of third parties (creditors) may play a role as well.

Adoption

The 1993 Hague Adoption Convention is in force in all Member States, but does not deal with certain problems of private international law that arise in international adoption proceedings. For instance, it will not apply when an adoption is to be recognised that has taken place in another Member State, without following the procedure of the Hague Convention. The granting of such an adoption will not necessarily have been the result of an attempt to evade the rules of the convention, as the interested parties may have all been resident in the other Member State at the time of the adoption.

Paternity

The question as to who the legal parents of a child are is not regulated by the framework at all.

Arbitration

The EU has no explicit rules on arbitration, since this is a matter regulated at the global level (particularly the New York Convention). Questions have arisen on the interface between the Brussels I Regulation and arbitration, in view of the exclusion of arbitration in art. 1. The Recast of Brussels I Regulation aims to tackle these questions.

The new problems of private international law

There are some fairly recent phenomena that have found acceptance in the substantive law of some Member States or which are regulated in international conventions. In family law the new phenomenon (since the 1990s) is the development in internal substantive law of non-marital registered partnerships, which commenced in Scandinavia. The 2000 Hague Convention on the International Protection of Adults deals with an issue that will become increasingly important with an aging population that tends to migrate even after retirement. A striking example in the case law of the lower Dutch courts was the case of a Dutch artist, a well-known painter, who had been living in Paris for decades. At one stage, he had been placed under the power of a guardian by the French courts, applying French law, granting his wife the power to become his legal guardian. As it happened, the painter was involved in a dispute in the Netherlands on the intellectual property of his artistic work. In these proceedings it was argued, ultimately without success, that the French decision on legal guardianship could not be recognised.

1.7.3. Concluding remarks with respect to the gaps

Brussels I can be regarded, outside the area of family law, as an almost complete instrument in respect of jurisdiction, recognition and enforcement. The exclusion of maintenance, as a consequence of the Maintenance Regulation (No. 4/2009), only strengthens the general 'civil and commercial' character of Brussels I.

There is a lack of a number of instruments on applicable law for civil and commercial matters (non-family law) and that would be a natural complement to Brussels I, namely law applicable to property, agency, trust, corporations. All these issues could be regulated in

instruments on private international law without, it is thought, a need for amendments to Brussels I.

In the area of family law the picture is much more diffuse. For a number of important issues rules on jurisdiction, applicable law and recognition and enforcement are absent. It is also in this area that substantive law in the Member States is not necessarily developing in harmony. Same-sex marriage and the alternatives to marriage provide obvious examples. This is also an area where a general principle of EU law (e.g. European citizenship) may continue to influence the development of the law in the area of PIL.

2. ADDITIONS THAT ARE NEEDED TO THE CURRENT FRAMEWORK, NOW AND IN THE FUTURE

2.1. Additions required in view of the genuine European area of justice

1999 was an important turning point in the development of private international law in the EU. Prior to 1999 only two EU Conventions were in force in this area: the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 (1968 Brussels Convention) and Convention 80/934/EEC on the Law Applicable to Contractual Obligations of 1980 (1980 Rome Convention). These Conventions were drafted to respond to the requirements of the common market, later the internal market. The 1968 Brussels Convention was, in particular, based on Article 293, EC Treaty (old Article 220, EC Treaty). This provision called for Member States to enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards. 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 still 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 harmonisation and codification of private international law in the EU must be assessed within the policy objective to create and maintain a genuine area of justice.

2.1.1. Articles 67 and 81, TFEU

The policy aim to gradually establish an area of justice was first articulated in Article 61, EC Treaty, within the new Title IV EC Treaty, in which the judicial co-operation was embedded pursuant of the Treaty of Amsterdam. Its successor as a result of the Lisbon Treaty, Article 67 of Title V 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) 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.

Chapter 3 of Title V (Article 81) deals with judicial co-operation in civil matters and provides a direct legal basis for the private international law matters covered by this report. Article 81, TFEU largely reiterates Article 65, EC Treaty, though it adds a couple of topics on which measures are to be taken. Article 81 TFEU reads as follows:

1. The Union shall develop judicial co-operation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such co-operation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
 - (a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;
 - (b) the cross-border service of judicial and extrajudicial documents;

- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) co-operation in the taking of evidence;
- (e) effective access to justice;
- (f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

It is noteworthy that the proper functioning of the internal market is mentioned in paragraph 2, but it does not seem 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 of specific existing instruments, for example the Rome II Regulation (discussed in Ch. 1.3.4.), the international market aspect was debated in view of the ‘universal’ territorial scope (expanding to non EU-torts, parties and laws). However, eventually it was not regarded as an obstacle for the establishment of such an instrument.

As paragraph 3 clarifies, measures in the area of family law require unanimity. This makes the adoption of instruments in this area more difficult, as was experienced with the Rome III Regulation on the applicable law to divorce and legal separation. Adoption was only possible in a limited number of Member States through the enhanced co-operation procedure laid down by Article 329(2) TFEU (see further Chapter 7.2).

The principles of mutual recognition and mutual trust play a crucial role in the development and further harmonisation and codification of private international law. The mutual recognition of court judgments and authentic documents may also benefit from and require instruments that regulate aspects of the applicable law and international jurisdiction. These contribute to safeguarding uniformity in the (national) law to be applied and a fair adjudication and distribution of disputes in the EU.

2.1.2. The Tampere 1999, The Hague 2004 and Stockholm 2009 programmes

The Tampere presidency conclusions (15th and 16th October 1999) have boosted the harmonisation and codification of private international law in the EU in order to strengthen the European judicial area. It stated that in a genuine European area of justice, individuals and businesses should neither be prevented nor discouraged from exercising their rights by

the incompatibility or complexity of legal and administrative systems in the Member States. It called for the strengthening of the principle of mutual recognition and the Council endorsed this principle as the cornerstone of judicial co-operation. As a consequence, it supported the abolition of *exequatur* (intermediate measures for enforcement), starting with family law matters. It has now been achieved in the context of Brussels II-bis (orders for right of access and return of the child), the European Enforcement Order Regulation, the European Payment Order Regulation, the European Small Claims Procedure Regulation, the a large extent in the Maintenance Regulation. The abolition of *exequatur* will also be achieved under Brussels I. In the recently established Succession Regulation the *exequatur* has been preserved. The same is also true for the proposed regulations on matrimonial property.

The Hague Programme of 2004 largely built on the Tampere Conclusions. It reinforced the further development of minimum standards for the purpose of the principle of mutual recognition. These primarily refer to instruments that fall outside the scope of this study (such as the service of documents). An important point of the Hague Programme for the present study, concerns the need for further coherence and implementation of the existing instruments. In this context, it may be considered to merge the Rome I and II Regulations (see Chapter 8.3). The consolidation of other instruments is at the moment not regarded as feasible, but this may change in the future. The current Stockholm Programme (2009) focuses primarily on the further strengthening of the principle of mutual trust, by establishing minimum procedural standards and primarily by non-legislative action (training, development of networks, evaluation and implementation). It further focuses on promoting citizens' rights, particularly by means of strengthening human rights and promoting the full exercise of the right of free movement. Private international law measures can support the free movement of citizens, particularly those in the area of family law and measures related to Union citizenship. Particularly for private international law it focuses mostly on the external dimension of the area of freedom, security and justice, *inter alia* by promoting accession of third countries to Conventions of the Hague Conference on Private International Law.

2.2. Private international law on the national level

2.2.1. PIL is also a phenomenon of national law

Private international law may be considered to be the part of a national legal system that comes into operation whenever a court is faced with a procedure that contains a foreign element. It has also been described as that part of law which comes into play when the issue before the court affects some fact, event or transaction so closely connected with a foreign system of law as to necessitate recourse to that system¹⁷.

There is no single system in place that can claim universal recognition, in spite of significant movements towards the harmonisation of PIL between various states. Thus, the many questions relating to the personal status of a party will in England often be dependent on the law of his domicile, but depends in France, Italy, Spain, the Netherlands and other Continental European countries often on the law of his nationality. Private international law still differs from jurisdiction to jurisdiction. A brief overview of the development of rules of PIL at the national level will be provided below.

2.2.2. The situation in the Member States

A tradition of PIL legislation in Germany

National German rules on the applicable law were codified to a significant extent in the Introductory Act to the German Civil Code (*Einführungsgesetz zum Bürgerlichen*

¹⁷ Fawcett & Carruthers, Private international law, 14th Edition, 2008, p. 5.

Gesetzbuch, EGBGB) of 1896, as amended in 1994 (most recently in 2011), and in some provisions of other statutes. Rules on jurisdiction and on the enforcement of foreign judgments were provided in the German Code of Civil Procedure (*Zivilprozessordnung, ZPO*) and in the Code for Non-contentious Proceedings (*Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit, FGG*). The FGG was replaced in 2008 by the FamFG (*Gesetz über das Verfahren in Familiensachen und Angelegenheiten der freiwilligen Gerichtsbarkeit*).

The autonomous German choice of law rule for torts, unjustified enrichment and *negotiorum gestio* (Articles 38-42, EGBGB) have not been deleted because of some perceived gaps in the substantive scope of the Rome II Regulation (i.e. violations of personality rights and nuclear damage).

Broadly speaking, German PIL is governed mostly by detailed black letter rules and not by open-ended provisions¹⁸, which should be consistent with international treaties ratified by Germany, EU law and the German constitution. The PIL rules governing natural persons, family law and succession law adhere mainly to the principle of nationality. Exceptions include parents and spouses with different nationalities, refugees and persons without any nationality (law of their habitual residence) and by virtue of the application of some of the Hague conventions.

The German concept of *renvoi* requires every foreign reference to German law to be a reference to German substantive law (Article 4 I 2, EGBGB). Furthermore, if the application of foreign law in accordance with German PIL manifestly violates German public policy (*ordre public*), the foreign law will not be applied, applied differently or substituted by German domestic law (Article 6, EGBGB).

Case law in England and Wales

PIL as found in England and Wales is a substantive part of English law and was, until the last two or three decades, almost entirely the result of judicial decisions, even though a considerable part has now been embodied in legislation (Fawcett & Carruthers, *Private international law*, 14th Edition, 2008, p.19), such as notably the Private International Law (Miscellaneous Provisions) Act 1995 and the Contracts (Applicable Law) Act 1990.

In Scotland, English decisions are sometimes followed if the rules of private international law of both systems are similar or the same, but not in areas where there are significant differences between both systems (e.g. where the defendant is domiciled outside the United Kingdom or the European Union) and with regard to the common law rules on recognition and enforcement of judgments.¹⁹

The three most important sources of the English conflict of laws are legislation, the decisions of the courts and the opinion of jurists. The English rules of the conflict of laws differ from those adopted in many continental European countries in one important respect. Questions of jurisdiction frequently tend to overshadow questions of choice of law. If a foreign court has jurisdiction according to English rules of the conflict of laws, its judgment or decree will often be recognised in England, regardless of the grounds on which it was based or the choice of law rule which it applied, while English law will often be applied if the English court has jurisdiction²⁰. Moreover, it is seldom possible for English courts to do what courts in continental European jurisdictions have often done, namely, to derive a general or multilateral conflict rule from a particular or unilateral one contained in a statute. This is due to the fact that in England broadly speaking a statute rarely displaces common law principles, unless the statute expressly abolishes the rule of common law²¹.

¹⁸ Siehr, in: Zekoll & Reimann, *Introduction to German Law*, 2005, p. 337.

¹⁹ See further Beaumont & McElevay, *Anton's Private international law*, 3rd edition, W Green, 2011.

²⁰ Dicey, Morris & Collins, *The conflict of laws*, 2006, 14th Edition, p. 4 and 10.

²¹ Dicey, Morris & Collins, *The conflict of laws*, 2006, 14th Edition, p. 22.

In England, it has also long been settled that questions affecting status are to be determined by the law of the domicile of the *propositus* and that, again broadly speaking, such questions are those affecting family relations and family property²². If a person has chosen to make his home in a new country for an indefinite period, it is generally held that it is appropriate that he should be connected to that country's system of law for the kind of purposes for which the concept of domicile is relevant.

There are different sets of rules to determine the jurisdiction of English courts: the Brussels/Lugano system (i.e. the rules contained in Brussels I, the EC/Denmark Agreement, the Brussels Convention and the Lugano Convention, the modified version of the Brussels I Regulation) and the traditional English rules on jurisdiction. Under the traditional rules, jurisdiction basically depends on the presence of the defendant in England²³.

Relevant foreign law in English courts must also be proved by appropriate evidence, unless both parties agree to leave the investigation to the judge and to dispense with the aid of witnesses. Proof of foreign law, including Scots and Northern Irish law, is rendered easier by Section 4(2), Civil Evidence Act 1972. Thus, whenever a question of foreign law has been determined in civil or criminal proceedings in the High Court or the Crown Court, any finding made or decision given in such proceedings shall, if reported in citable form, be admissible in later civil proceedings as evidence of the foreign law, unless the contrary is proved.

Recent codifications in three Member States

Three Member States recently codified their national private international law. Poland recently adopted the Polish Act on private international law of 4 February 2011. Since the 16th of July 2004 Belgium also has a unified PIL Code. In the Netherlands, Book 10 of the Netherlands Civil Code on PIL entered into force on the 1st of January 2012. These codifications will be discussed in more detail in paragraphs 9 and 30.

The Scandinavian approach (co-operation)

There is no single codified substantive law with regard to PIL in any of the Nordic countries. However, since the 1930s the Nordic countries have drafted conventions in a number of areas that have become part of an *acquis nordique* (Carsten, 'Europäisches Integration und Zusammenarbeit auf dem Gebiet des Zivilrechts', ZEuP 1993, p. 335). As a rule of thumb, in family law, the law of the habitual residence generally applies in Denmark, Iceland and Norway while Sweden and Finland apply the principle of nationality (Bergmann/Ferid, *Internationales Ehe- und Kindschaftsrecht: Dänemark*, p. 19). There are no laws in Finland on whether the judge is obliged to apply the law of a foreign state on his/her own initiative. According to legal literature the court of law can, at least in matters where mediation is allowed, apply its own law unless the party in question has referred to the law of a foreign state.

The most important Nordic conventions in the area of private international law concerns the area of matrimonial property, adoption, maintenance, parentage and the recognition of civil judgments. These Nordic conventions have also been incorporated into national legislation in Sweden. Otherwise, the Nordic provisions of PIL generally take precedence over national private international law. See further, generally, the website of the European Judicial Network on applicable law <http://ec.europa.eu/civiljustice/>.

²² Fawcett & Carruthers, *Private international law*, 14th Edition, 2008, p.157

²³ Fawcett & Carruthers, *Private international law*, 14th Edition, 2008, p.454.

2.3. A brief comparison of three recent codifications: Belgium, the Netherlands and Poland

2.3.1. The Belgian Code of Private International Law 2004

On 1st October 2004, the Code of Private International Law entered into force. This code is a comprehensive codification of private international law that incorporates rules on jurisdiction, applicable law and the recognition and enforcement of foreign decisions and foreign authentic instruments. The Belgian PIL Code consists of 140 articles, including a set of rules regarding general principles and transitional rules.

The making of the Code of Private International Law

The Belgian PIL Code was drafted on the initiative of a number of lecturers in private international law. The Ministry of Justice later approved steps to prepare a code. They consulted a number of specialists in the process, among the judiciary, public notaries, the circle of civil status registrars and specialists in the area of family law and copyright (intellectual property) and politicians. Work started in 1995 and after parliamentary discussions, the Council of Ministers adopted the code in 2002. In the period prior to the entry into force of the code, the legislation in the field of Belgian private international law was piecemeal. Most significant were the solutions achieved in case law.

Article 2 of the Code determines the relationship between the Code and the (many) international instruments:

Article 2. Subject

The present statute regulates in an international situation the jurisdiction of Belgian courts, the designation of the applicable law and the conditions for the effect in Belgium of foreign judgments and authentic instruments in civil and commercial matters without prejudice to the application of international treaties, the laws of the European Union or provisions of special statutes.²⁴

Accordingly, Article 2 affirms the primacy of international and European instruments.²⁵

The structure of the Code of Private international Law

The structure shows a general part and a specific part, in which for various issues rules governing jurisdiction, applicable law and as the case may be the recognition and enforcement of foreign decisions and foreign authentic instruments have been incorporated.

Chapter I contains rules on general principles, that bear relevance to all parts of the Code. Article 3 refers to the use of nationality as a connecting factor and so does Article 4 regarding the use of domicile and habitual residence as a connecting factor. Further Section 4 of the first chapter deals with jurisdiction (see for example Article 11 on the exceptional attribution of international jurisdiction and Article 14 regarding the international *lis pendens*), Section 5 with conflict of laws (see for example: Article 15 on the application of foreign law, Article 16 regarding the principle of *renvoi*, Article 21 on the public policy exception and Article 19 holding a general exception clause). Section 6 provides rules regarding the effect of foreign judgments and foreign authentic instruments (see for

²⁴ Taken from: <http://www.ipr.be/data/B.WbIPR%5bEN%5d.pdf>.

²⁵ See: J. Erauw, 'Historiek van de opmaak van het wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht', www.ipr.be; M. Pertegas, 'The Belgian Code on Private International Law: a tour d' horizon', *IPRax* 2006, pp. 53-61.

example Article 25 holding the grounds for refusal of recognition and enforcement). The next Chapters deals with specific topics: natural persons (II), marriage and matrimonial causes (III), the relationship of cohabitation (IV), parentage (V), maintenance obligations (VI), succession (VII), goods (VIII), obligations (IX), bodies with separate legal personality (X), collective insolvency proceedings (XI), and trusts (XII).

Each of these chapters begins, as a rule, with rules on jurisdiction, followed by choice of law rules and as the case may be rules on recognition and enforcement. The last chapter contains the final provisions, including transitional provisions²⁶.

2.3.2. Book 10 Dutch Civil Code

Dutch Private International Law has been incorporated into the Dutch Civil Code since the 1st January 2012 in the form of Book 10 of the Civil Code. The Dutch Civil Code (NL CC) is divided into Books dedicated to distinct issues of private law, thus Book 1: Family Law, Book 2: Legal Persons, Book 3: General matters of the Law of obligations, etc. All Books, except Book 10, only contain substantive law. The idea of a separate code on private international law, outside the Civil Code was rejected. Since 2002, the rules on international jurisdiction are to be found in Article 1-14, Dutch Code of Civil Procedure.

According to Dutch law, private international law covers rules on jurisdiction, applicable law and recognition and enforcement. Book 10 NL CC consists mostly of rules regarding the applicable law (choice of law rules). Book 10 NL CC does not contain rules on jurisdiction. These rules have been incorporated into the Netherlands Code of Civil Procedure, Book 1, Title 1. Book 10 NL CC contains some specific topics rules regarding the recognition, however the basic principle is that the issue of recognition and enforcement of foreign decisions falls under the scope of the Dutch Code of Civil Procedure.

Book 10 NL CC contains statutory provisions of PIL and references to Conventions and European Regulations. Article 1 provides for the relationship between these three sources:

Article 1

The rules of private international law contained in this Book and in other statutes shall not preclude the effect of international and Community legislation that is binding on the Netherlands.

The same basic principle is reflected in Article 94, Dutch Constitution.

Book 10 does not contain an enumeration of the Conventions, Regulations and Directives that contain a PIL-rule. The reason for this is that such a list would not be complete. Inclusion of such a list could accordingly be considered misleading. Nevertheless, Book 10 refers to several treaties with regard to various issues, for example in Article 10:103 reference is made to the 1993 Hague Convention on protection of children and co-operation in respect of intercountry adoption (Hague Adoption Convention) and in Article 10:142 to the 1985 Hague Convention on the law applicable to trusts and their recognition. Article 10:158 refers to the Rome I Regulation.

The making of the Netherlands legislation

The Ministry of Justice (presently the Ministry of Security and Justice) and the Netherlands Standing Government Committee on Private International Law joined forces to codify this area of law in the early 1980s. Members of the Standing Government Committee are typically drawn from the judiciary, academia and legal practice. The method chosen was the step-by-step method followed by a consolidation of the acts on separate issues. The Ministry

²⁶ See: J. Erauw, 'De komende codificatie van het Belgisch Internationaal Privaatrecht', www.ipr.be.

prepared an advisory draft text for an act concerning a specific topic (e.g. parentage). This draft had no official status, but instead functioned as a sort of working paper. On the basis of the deliberations between the Ministry and the Standing Government Committee a bill would be proposed to Parliament. As such, the codification process started with the 1980 Act on the applicable law on divorce (1980), and came to an end with the Act on the applicable law on property (2008). Altogether, sixteen statutes were adopted through this step-by-step method. During the period 1980-2008 the Netherlands also proceeded with the ratification of several conventions in respect of private international law (notably the Hague Conventions on Marriage, Matrimonial Property, Inheritance, Agency, and the Rome Convention) and prepared the secondary legislation required for the application of these conventions or with regard to European Regulations.

At a certain stage, short before the turn of the century, most of the statutes on separate topics that would later find their place in Book 10 Civil Code had already been adopted. A number of Hague Conventions had also entered into force for the Netherlands. Work had also already commenced on the future first title of Book 10 NL CC, containing general provisions of Private International Law. The Netherlands Standing Government Committee on Private International Law completed a draft bill on this topic in 2002. Seventeen general provisions have been included in Book 10 NL CC (see, for example, Article 4 on the incidental question, Article 7 on mandatory rules, Article 8 contained a general exception clause for the applicable law, and Article 10 choice of law). Finally, all the different acts were incorporated in Book 10 NL CC, preceded by general provisions that were collated in Book 10. Nonetheless, prior to enactment the existing PIL rules were examined in the light of the general provisions. Attention was also drawn to inconsistency in the use of terminology and the content of the rules themselves.

Book 10 NL CC is essentially a consolidation of the previous PIL legislation, with one new element: the general provisions. Regarding the consolidation, only one significant amendment was made: the choice of law rule regarding divorce. This rule was changed in applying the Dutch law as the *lex fori*, with the possibility of choosing the common national law of the spouses.

The structure of Book 10 NL Civil Code

Book 10 contains 165 articles, divided into 15 titles. The first title is dedicated to the general provisions. A choice was made for the codification of general doctrinal issues whenever a certain consensus existed on a particular issue. Contentious issues in case law and in literature were not considered to be ready for codification. Title 1 contains seventeen general principles.

The fourteen other titles are dedicated to: name (Title 2), marriage (Title 3), with subtitles dealing with the celebration and recognition or marriage, legal relationships between spouses, matrimonial property regimes, dissolution of marriage and separation, registered partnerships (Title 4), parentage (Title 5), adoption (Title 6), other issues of family law (such as child abduction, maintenance) (Title 7), corporations (Title 8), agency (Title 9), property law (Title 10), trust (Title 11), succession (Title 12), contractual obligations (Title 13), no-contractual obligations (Title 14), and finally, some provisions on the conflict of laws regarding maritime, inland water and air transport (Title 15).²⁷

2.3.3. The Polish Act of February 4, 2011 on Private International law

The 2011 Polish PIL Act (PPIL) contains rules on the applicable law for nearly all private law relationships (except for those stemming from bills of exchange and cheques). It does not

²⁷ For an overview in the English language, see: K. Boele-Woelki/D. van Iterson, 'The Dutch private International law Codification: Principles, Objectives and Opportunities', *Electronic Journal of Comparative Law*, Vol 14.3.

cover jurisdiction nor enforceability of judgments (see below). The 2011 Act replaced the former codification of private international law: The PIL Act of 12 November 1965.²⁸

2011 PPILC contains 81 articles divided into 19 chapters (1: General Provisions, 2: Natural Persons, 3: Moral Persons and Other Organisational Entities, 4: Representation, 5: Conditions and Formalities of the legal act, 6: Prescription and Other Institutions Connected with the Passage of Time, 7: Obligations, 8: Arbitration Agreement, 9: Ownership, other Property Rights, and Possession, 10: Intellectual Property, 11: Marriage Related Matters, 12: Parent-Child Relationships, 13: Adoption, 14: Guardianship and Parental Authority, 15: Maintenance Obligations, 16: Inheritance Matters, 17: Other Legal Relationships, 18: Amendments to the Provisions Already in Force, 19: Final Provisions).

The PPILC explicitly refers to relevant EU provisions, e.g. Article 28 which refers to the Rome I Regulation. There are also some references to the international conventions. See also the discussion below with respect to Article 30, PPILC.

The reason for the Polish approach consisting of simultaneous codification can be accounted for historically. The nation was divided between three countries for more than 100 years prior to independence having been regained in 1918. The Codification Commission for Civil and Criminal law, which convened the following year, aimed at delivering an original, modern set of rules, instead of adopting a template borrowed from a previous occupying country. This effort resulted in the adoption of the Private International Law Act of 1926, subsequently replaced by another codification, enacted by the communist regime in 1965 (the 1965 PPIL).

The discussions on the necessity to amend or to overhaul the 1965 PIL Act started in the early 1990s. In 2002 the Private International Law Division of the Civil Law Codification Commission (CLCC) was given the task to prepare a draft of an entirely new PPIL. In 2005, the CLCC approved the draft, but further amendments were introduced in 2006-2008. According to the official explanations accompanying the project, its aims were the harmonisation of the Polish PIL with the EU law, its modernisation and the filling of gaps in the 1965 PPIL.

The Government sent the project to Parliament on 31st October 2008. One of the external experts indicated that the draft violated Article 18 of the Polish Constitution (providing that marriage is the union of a man and a woman) because of the lack of an express prohibition of recognition of foreign same-sex marriages and registered partnerships. Others argued against the new codification, but generally supported the idea of amending the original 1965 PIL Act.

Despite of these objections the new PIL Act was enacted on 4th February 2011, published on 15th April 2011 and entered into force on 16th May 2011 (except for Article 63, which entered into force on 18th June 2011).

2.3.4. The subject matter in more detail

Jurisdiction and recognition and enforcement

The Belgian Code of Private International Law also contains rules on jurisdiction, as well as on enforcement and recognition, while the Dutch and Polish legislatures decided to limit the PIL legislation to choice of law rules. Except for some general rules concerning jurisdiction, a separate chapter (or specific area) of the Belgian Code contains a specific rule with regard to the jurisdiction and recognition and enforcement for the issue covered by the chapter.

²⁸ For a German language overview of the new Polish PIL Act, see M. Pazdan, Das neue polnische Gesetz über das internationale Privatrecht, IPRax 2012, p. 77-81.

As set out before, Book 10 Dutch Civil Code contains neither rules on jurisdiction nor rules on recognition and enforcement. Title 1 of Chapter 1 of the Dutch Code of Civil Procedure (NL CCP) contains 14 rules regarding international jurisdiction. When no legislation on the international level, as treaties or European Regulations, is applicable regarding international jurisdiction, Articles 1-14 of the Dutch Code of Civil Procedure, as they have read since 1st January 2002, are applicable. These provisions are modelled on applicable international treaties and European Regulations, especially Brussels I.

Article 1 reads:

Without prejudice to what is regulated with regard to jurisdiction in Treaties, Conventions and European Regulations, the jurisdiction of Netherlands courts is subject to the following provision.

Furthermore, it can be noted that there is a distinction between legal proceedings initiated by summons (*dagvaarding*) (mostly civil and commercial matters outside family law, see Article 2, with additions in Articles 6 en 6a NLCCP) and proceedings initiated with a petition (*verzoekschrift*), which occurs mostly in family law matters (Article 3 NLCCP, with further rules in Articles 4 and 5 NLCCP).

The NLCCP struggles with the relationship between EU PIL and national PIL. This may be deduced from Article 4(1) NLCCP which states that, even when the Brussels II-bis Regulation is not directly applicable, the jurisdiction of the court in matters of divorce, legal separation, the dissolution of a marriage after legal separation and the nullity, annulment or validity of a marriage, has to be determined through the analogous application of Articles 3, 4 and 5 of the Brussels II-bis Regulation.

Articles 8 and 9 NLCCP concern the choice of forum; a rule on the *forum necessitatis* is provided in Article 9(2) CCP.

The revision of the Dutch Code of Civil Procedure did not introduce a new set of rules regarding recognition and enforcement. The century old Article 431 NLCCP is still the only rule. Case law has held that it follows from this provision that leave for the enforcement of foreign judgments cannot be granted in the Netherlands, unless a treaty (or European instrument) provides for recognition of the foreign judgment. In the absence of an international instrument, the party who wishes to enforce the foreign judgment must commence new proceedings in the Netherlands, basing his or her claim on the decision granted by the foreign court. The foreign judgment must always meet certain minimum standards in order to be recognised. Once these standards are met, the court is in principle free to recognise, or not recognise, the foreign decision.

In Poland, the jurisdiction of the courts and the enforceability of judgments are (and were under 1965 PIL) regulated in the Act of 17 November 1964 – the Code of Civil Procedure in Part IV (Articles 1097 to 1153) entitled “International civil proceedings”, which consists of three books:

- Book I – Jurisdiction (of Polish courts) (Articles 1097 to 1116)
- Book II – Proceeding (Articles 1117 to 1144)
- Book III – Recognition and declaration of enforceability (Articles 1145 to 1153)

Arbitration is regulated in Part V of the Code of Civil Procedure (Articles 1154 to 1217) divided into 8 Titles (General Provisions, Arbitration Agreements, Composition of the Arbitral Tribunal, Jurisdiction of the Arbitral Tribunal, Conduct of Arbitral Proceedings, Making of an Award and Termination of Proceedings, Applications to Set Aside the Award, Recognition and

Enforcement of an Arbitral Award and a Prior Settlement). However, the rules on the applicable law to arbitration agreement are covered by the 2011 PIL (Article 39-40).

General provisions

It can be noted that Belgium, the Netherlands and Poland have incorporated a set of rules in their PIL-legislation regarding general principles applicable to private international law cases.

2.3.5. The rationale behind the national codification

Motives and purposes

In Belgium an important objective was to enhance transparency through codification. Furthermore, the Belgian legislature wanted to adopt an open and international approach, so as to make the codification consistent with generally accepted rules found in international treaties and in international doctrine. As such, the Code is laced with European and international solutions.

In the Netherlands, the primary aim was to meet the needs of legal practitioners and national legislation in the area of conflict of laws. Furthermore, it was intended to make the choice of law rules more accessible to those unfamiliar with this area of law.

In Poland, there was a need to amend the 1965 Private International Law legislation and to adapt it to contemporary demands. There was also a perceived need to harmonise the Polish private international law (the rules on the national level) with EU law.

Justification in view of developments on the EU or international level

In Belgium, there has been some doubt regarding the necessity of a national codification in view of the activities of the Hague Conference and the European legislature in the field of private international law. Article 2 of the Belgian Code shows the outcome of the discussions: the national codification fills the gap that the codification at the international level leaves open.

In the Netherlands, the Government had discussed the relationship with European developments in the field of private international law. The national codification of private international law is considered to be a valuable complementary tool to the European law in this field. As such, national rules remain relevant in areas that have not been addressed at the European level. Even in cases where some inroads have been made by European regulations, national legislation is still considered to be relevant. More generally, it may be said that in order to guarantee coherence between national European and international rules and to bolster European (and international) initiatives, the construction of a modern Dutch system of private international law that draws on the latest insights in this field of law and meets contemporary societal demands, is required. The Netherlands accordingly strives to keep up with developments in recent legislation in other European countries such as Belgium, Germany, Switzerland, Austria and Italy.

As for the harmonisation of Polish private international law with EU law, it is worth pointing out that official explanations expressed in the legislative process admit that the legislative activity of the EU in the field of PIL makes the new codification problematic. The main arguments to support the creation of a national code on private international law, despite the EU activities were that: a) the EU only deals with certain areas of PIL and b) the EU actions will not, in the foreseeable future, impact on the general part of PIL, nor on questions of the general part of civil law (e.g. personal status). Furthermore, there is still a need for national legislation, as Rome I and Rome II provide for exclusions in matters that are important from a practical point of view, e.g. company law and arbitration (Rome I) or

the liability of the State for acts and omissions in the exercise of State authority and non-contractual obligations arising out of violations of privacy and rights relating to personality (Rome II). The explanations admit that if new EU regulations are adopted (and should they have a universal scope) the corresponding national rules in the code will have to be repealed.

An interesting feature of the Polish legislation is that the Polish legislature has tried to fill a ‘gap’ in respect of consumer contracts that was apparently perceived in the Rome I Regulation. In its wording the provision brings into mind the ECJ decision taken in respect of the directive on commercial agency in *Ingmar* (ECJ, 9th November 2000, C-381/98). Article 30, PPILC provides that a choice of law by parties for a state that is not a member of the Economic European Area for a contract that has a close connection with the territory of at least one Member State may not deprive the consumer of protection granted by the Directives 93/13/EEC, 97/7/EC, 1999/44/EC, 2002/65/EC or 2008/48/EC. The rule demonstrates the special links that exist in relation to the EEA.

2.4. Developments in internal substantive law that influence PIL

In a traditional view, private international law used to be mechanism through which a given system of private international law would look at other private law systems. When the national legal system was faced with an institution of foreign law it had to determine whether such an institution could have any legal consequences in the national jurisdiction. Typical examples are the question how a civil law system should deal with a trust from the common law, or how a Western legal system should deal with the *kafala* of Islamic origins. Over the course of centuries, Western private international law systems have developed a rather refined system of classification categories, which enable the courts and others who have to apply rules to determine to which subset of private international law rules a case should be subjected. One of the first decisions a court will have to take is characterisation, to determine whether the case concerns matrimonial property law, the validity of marriages, property law, or the name, and to accordingly apply the rules relevant for that area of the law.

The process of developing the categories of choice of law rules has become more and more a comparative process, although there is still a basic assumption that in the absence of an international rule, characterisation should take place in accordance with the *lex fori*. Another result of the harmonisation of private international law rules is that nowadays courts of common law Member States will also apply the law that is applicable to the contract to the question of statute of limitation and no longer see this problem a question of procedural law (see Article 10(1)(d) Rome Convention 1980; Article 12(1)(d) Rome I).

The systematisation of private international law through categories of choice of law rules will never be fully completed, as it can be expected that national legal systems will develop and create new legal institutions. A recent example is the changing views on status in national jurisdictions. This development started with the introduction of the ‘registered partnership’ in Scandinavian states since 1989. The introduction of this institution meant that not only the state of origin, but also other states had to determine how the new institution would fit into the current system of private international law, or whether a new category of rules had to be developed. Today, some twenty years later, the property consequences of these new institutions may be regulated in European legislation, see the proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (2011/0058 (CNS)).

Another current example of the continuous development of national law that leaves a mark on private international law is the opening of marriage to couples of the same-sex. When introduced in the Dutch substantive law, the first jurisdiction in the world to do so, the question arose whether same-sex marriage was a marriage under the terms of the relevant Hague Conventions which had been ratified by the Netherlands (in particular the Hague

Conventions on Marriage (1978), Matrimonial Property (1978) and Maintenance (1973)). Not too surprisingly, the outcome was that from the Dutch perspective these conventions could be applied to same-sex marriage. It is, however, possible that the courts and other authorities in other states party to these conventions would not follow this view. It should further be noted that these developments tend to commence as phenomena of internal law. The international consequences are often disregarded when the substantive provisions are being developed by national legislators. Their acceptance at the international level may take decades.

Other examples where the dynamics of (internal) law create new challenges for private international law are again in the area of family law. The acceptance of marriage or other unions between same-sex couples led to the question of adoption by such couples. New possibilities in respect of surrogate parenthood have led to difficult questions of parentage. Today a child may be born from a woman who is not the biological mother, in a state different from the state of nationality or habitual residence of those with whom the child shares biological links. It must be recognised that, at least at present, it is more difficult to give an example outside the area of family law where the dynamics of the national legal order create a problem at the international level.

Another way in which developments in substantive law can change private international law is that values, considered important at the national level, transcend into the system of choice of law rules. It is often said that choice of law rules are intended to be neutral and that in the traditional analysis of private international law (certainly in Continental Europe) the aim of the choice of law rule is to determine the law most closely connected to the matter. Nevertheless, certain rules of private international law have now been based on the principle of favouring certain groups, or even certain results. In EU private international law, examples of the 'bias' are the special rules aimed at protecting workers or consumers. National or other international, non-EU private international law rules offer other examples of protecting certain groups or rights. An example is the *favor matrimonii* principle in the Hague Marriage Convention. Another example is the *favor divortii* principle recognised in Dutch private international law, which results in the application of the *lex fori* to divorce cases. Adherence to such a principle in private international law can probably not be dissociated from the acceptance of no-fault divorce in internal substantive law. Values on the level of internal law creep into the treatment of international cases.

2.5. Gaps in the European framework and the contents of national PIL law

2.5.1. Comparison between the framework and the national codifications

A typical feature of national codifications of private international law is that they may contain rules on principles of private international law or general provisions of private international law. These principles are laid down in national legislation, even though international or European law regulates a considerable part of private international law. The codification in the Netherlands provides a clear example. These principles must always be understood as national law, despite the fact that they are developed from the theory of private international law, which has a universal character. The principles do not offer a solution when principles of EU law interfere, e.g. European citizenship.

National codifications take different views on the need to integrate applicable law and procedural law (jurisdiction and recognition and enforcement). The Netherlands and Polish codifications, for example, in principle only deal with applicable law.

2.5.2. Developments in internal law not identified in the framework

There are some institutions of internal law that are not common to all Member States and still need to be fully regulated in the framework. These include the common law concept of the trust, formal alternatives to marriage, as well as same-sex marriage. These gaps the framework have already been identified in Chapter 1.7.

2.6. The gaps that can be identified

It was already possible to identify gaps in the current framework by assessing its current content, by considering the scope of the various regulations and by comparing the current framework to the traditional analysis of private international law. One purpose of the survey of the modern private international codification of selected Member States was to identify to what extent these codifications point to possible gaps that had not yet been considered. Another purpose of this survey was to consider the structure and origin of the codification and to understand the considerations that underlie national codifications.

Taking into account the survey of the national codifications, the gaps in the current framework can be divided into three main categories. First of all there are gaps which are the willed result of territorial limitations to the scope of the EU legislation. Secondly, there are systematic gaps that arise when the current framework is compared to the separate problems that comprise the traditional problems of private international law. The current framework regulates most of these separate problems, but not all of them. Thirdly and finally, there are gaps when EU legislation provides that certain questions are deliberately omitted from the scope of an instrument, although from the systematic perspective these questions form part of the issue regulated in the instrument, e.g. contractual obligations.

2.6.1. The territorial scope of the rule

Limitation of the territorial scope only matters in respect of jurisdiction and recognition and enforcement. The choice of law rules of Regulations Rome I, II and III, the Maintenance Regulation and the Succession Regulation are applicable regardless of whether the law designated by the Regulation is the law of a Member State.

The jurisdiction rules of the Maintenance Regulation claim universal application, irrespective of whether the maintenance creditor or debtor has habitual residence in a Member State. See, for example, recital (15) of the Maintenance Regulation: “(t)he circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This Regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction”.

A similar approach is not, however, found in Brussels I. In general Brussels I will not apply when the defendant has habitual residence in a third state. Although it is understood that an approach similar to that of the Maintenance Regulation was discussed during the work on the revision of Brussels I, this has since been abandoned (see Article 3 of the proposal 10609/12 ADD 1). Limitations to the territorial scope of the jurisdiction rules also exist in Brussels II-bis and the Succession Regulation. In Brussels II-bis the scope of application is also dependent upon the EU nationality of a party. A court of a Member State will always have jurisdiction when both spouses are nationals of that Member State and a spouse who is a national of a Member State may be sued in another Member State only in accordance with the regulation.

Recognition and enforcement of judgments or authentic instruments under the Brussels Regulations, the Maintenance Regulation or the Succession Regulation is only possible when the judgment or authentic instrument emanates from a Member State. National rules still determine whether a foreign decision from a third state can be recognised or enforced. It

must be noted that a court decision to grant enforcement to a decision from a third state on the basis of national law or on the basis of treaty obligations of the member state in question, does not transform the original decision into a court decision from a Member State that must subsequently be recognised under one of the relevant regulations.

2.6.2. Systematic gaps

A number of gaps can be identified that concern generally accepted problems of private international law which are currently not regulated by community instruments. Systematically they fall outside the subject matter of the current instruments. It was already possible to identify these gaps in paragraph 1.7.2 and for further discussion reference is made to that paragraph.

With respect to the law of obligations, these gaps are:

- Property law
- Trusts
- Agency
- Corporations
- Arbitration

With respect to family law these gaps are:

- Marriage
- Registered partnerships and similar institutions
- Name of natural persons
- Adoption
- Paternity
- Protection of Adults
- Status and capacity of natural persons in general.

A possible 'systematic' gap in the framework is collective redress. This problem has been the subject of public consultation in 2011.

One could further make the remark that the current framework contains rules on various general problems of private international law, such as public policy, mandatory rules or *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, e.g. contract law. This contrasts with the approach in some national codifications, which contain separate provisions dealing with these general problems. These general rules are accordingly applicable in all cases. The question whether this repetition of rules warrants the integration of these rules in a single instrument will be discussed hereunder.

2.6.3. Deliberate gaps

Some gaps exist as application of the rules of the relevant community instrument is deliberately excluded for certain problems, although they systematically would fall under the subject matter of the instrument. A clear example is Article 1(2) Rome II which excludes a number of non-contractual obligations from the application of Rome II, the instrument that in principle aims to determine the law applicable to non-contractual obligations.

In the area of contract law deliberate gaps that can be identified are:

- Arbitration agreements; and
- Very specific types of insurance contracts that border on social insurance.

In the area of tort law deliberate gaps that can be identified are:

- Non-contractual obligations arising out of nuclear damage; and
- Violation of privacy and other rights relating to personality, including defamation.

A half-way house between contract and non-contractual obligations is the exclusion of obligations arising out of negotiable instruments, as far as these obligations arise out of their negotiable character, which is made in both Rome I and Rome II.

An issue in the area of family law that is regulated in the Dutch codification is the attribution of pension rights accumulated in a pension scheme during marriage in the case of divorce of the spouses. It is unclear whether pension rights would fall under the notion of matrimonial property, as to be interpreted autonomously under the future regulation on matrimonial property. Pension plans are also excluded from the Succession Regulation (Article 1(2)(g) Succession Regulation).

EU law sometimes allows for the application of specialised conventions, which deal with issues that could fall under existing EU legislation, when the Member State in question is a party to a specialised Convention, such as the Hague Agency Convention 1978 or the Hague Road Accidents (Applicable law) Convention 1971. These are not true gaps, as Union law allows this application (see for example Article 28 Rome II). Also, the relationship between Rome II and the Hague Road Accidents (Applicable law) Convention 1971 is subject of further investigation by the Commission (Article 28(2) Rome II). Case law of the CJEU further imposed limitations on the possibility to apply existing, older conventions relevant for private international law (see *TNT Express* (C-533/08)).

2.6.4. Notions open to interpretation found in the framework

In addition to these three main categories of gaps (territorial scope, systematic gaps and deliberate gaps) it should be pointed out that as a consequence of various factors, the EU instrument may contain rules that refer to notions, which by their nature are open to interpretation. More often than not the open character of the rule has been intended by the legislature in order to provide the flexibility that is deemed necessary when setting rules for situations that have links with more than one legal system.

A clear example of a reference to a notion with an open or non-defined character is the concept of habitual residence. Another example is the reference to obligations arising out of the negotiable character of a negotiable instrument in Article 1(2)(d) Rome I. Yet another notion that is open to interpretation is that of matrimonial property. The proposal for a future regulation on matrimonial property indicates that the meaning of ‘matrimonial property regime’ must be interpreted autonomously.

For the time being it is better left to case law or legal writing to determine the meaning of these open notions. It appears that only by examining the interpretation of these notions by the national courts and the CJEU that trends in the case law may become apparent that could lead to legislation that further defines these notions. It is to be expected that problems, if any, in the application of these notions will eventually be identified by the reports on the application of a regulation that must be drawn up periodically by the Commission (cf e.g. Article 27 Rome I Regulation; Article 30 Rome II Regulation; Article 73 Brussels I). An example of an ‘open’ notion that has later been defined in more detail in EU legislation is the notion of the ‘characteristic performer’ that is relevant for determining the applicable law to a contract under Article 4(2) of the Rome Convention 1980. Article 4(1) Rome I now determines for a number of contracts which law is applicable, mostly by reference to the habitual residence of the party that also carries out the characteristic performance.

2.7. Additions to the framework

On the basis of the analysis of the various gaps made in paragraph 2.5, it is also possible to indicate which additions are still necessary to the framework, regardless of the feasibility.

The truly necessary additions would be the gaps that have been identified as 'systematic' gaps, as there is no rule that can be applied. The absence of harmonised or unified rules has immediate effect on the citizens and businesses with the EU.

With respect to the territorial gaps, which exist mainly with respect to jurisdiction and recognition and enforcement, there is no clear indication of an imminent need to fill the territorial gap from the community perspective in general civil and commercial matters. In principle the territorial gap also raises the nature of the relationship with third states. It appears that the best possible solution to address the territorial gaps will be through the conclusion of international conventions by the EU. Limitations to the territorial scope may present a more acute problem in family law matters when this limitation blocks the access to the courts of a Member State of the European Union for nationals of a EU Member State who are residing in a third state, as can be the case in status matters under Brussels II-bis.

With respect to the territorial gaps that exist as some Member States have opted out of the framework, these gaps are the consequence of a political status quo that will have to be accepted. Should these Member States opt-in, an immediate end to this situation would be achieved.

With respect to the deliberate gaps, the need to address the gaps is not imminent. Dealing with the deliberate gaps is better left until the law on the systematic gaps has been dealt with. At that stage it should be clear whether these 'deliberate' gaps are still important or have been solved as a result of systematically completing the framework.

With respect to the notions open to judicial interpretation that are found in the framework, the further understanding of these notions is best left to case law and legal writing. It appears that the analysis of national case law and the case law of the CJEU is a necessary first step before a discussion on further legislation should commence.

3. THE ROLE OF THE EU LEGISLATURE

3.1. The options that are in general open to the EU legislature in respect of PIL

3.1.1. The legal basis of EU legislation on PIL

The 1997 Amsterdam Treaty introduced the wider concept of judicial co-operation and brought the three core issues of private international law into the scope of the European Community (Article 65 under (a), third indent; and (b) EC 1997). The three core issues are now found in Article 81 (2)(a) and (c) TFEU.

As the EU does not have exclusive competence in the area of judicial co-operation in civil matters, it must respect the principle of subsidiarity²⁹. This 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’s Lower Chamber that the Commission’s proposal on the registered partnerships (COM/2011/0127 final) breaches the subsidiarity principle.

The consequences of the subsidiarity principle are twofold. The EU can only act on the basis of the powers conferred to it. Also the EU can only act in respect of those matters where the action cannot be satisfactorily achieved by the Member States: action on the national level is insufficient and action on the European level is deemed more effective.³⁰

The principle of proportionality relates to the nature of the legislative tool used by the EU. At present, the instrument of choice for legislation on private international law is the regulation. The use of this instrument for the area of private international law is generally supported³¹. A novelty introduced by Regulation 4/2009 is that the Regulation is combined with the ratification of an international convention (the Hague Protocol) by the EU.

3.1.2. EU PIL legislation as a replacement of national PIL

The replacement of national PIL by EU PIL instruments is manifest for the subject matter covered by the Regulations Rome I and Rome II. For various reasons these instruments have made national private international law rules superfluous. The main reason is that the choice of law rules of Rome I and Rome II apply irrespective of whether the designated law is the law of a Member State or of a third state. It further transpires that to the extent problems are outside the substantive scope of application of the Rome I and Rome II regulations, there is a tendency to apply the rules of the regulation by way of analogy. The exception being that the Member State in question is a party to a specialised convention, such as the Hague Agency Convention 1978 or the Hague Road Accidents (Applicable law) Convention 1971. It must be noted that Germany retained the ‘old’ conflicts of law rule on tort to deal with issues not regulated by Rome II.

The Brussels I Regulation also exerts a strong influence outside its sphere of application, as did its predecessor, the Brussels Convention. The rules of these two instruments lie at the heart of the Lugano Conventions of 1988 (based on the Brussels Convention) and 2007 (based on Brussels I) and thus are also applied in relation to the EEA. National rules on

²⁹ See in general on this topic: Baarsma, *The Europeanisation of international family law: from Dutch to European law: an analysis on the basis of the choice of law on divorce and on the termination of registered partnerships*, 2010, p. 115 ff.

³⁰ Baarsma, cited above, p. 116.

³¹ Baarsma, cited above, p. 119-120, who stresses the advantages of the use of regulations in this field.

jurisdiction appear to be influenced by the example of the Brussels Convention and Brussels I. This is clearly the case in the jurisdiction rules of the 2002 Dutch Code of Civil Procedure, which maintains the principle of the court of domicile of the defendant and contains special jurisdiction clauses that follow Article 5, Brussels I. An interesting consequence is that such jurisdiction clauses may mean litigants will have to litigate in a third state with which no treaty exists on recognition and enforcement.

In the area of family law the 'replacement' of national private international law by EU rules is less manifest. The question whether the jurisdiction rules in respect of divorce and parental responsibility of Brussels II-bis fully replace national rules is not clear, as has been set out above. The unification of choice of law rules in respect of divorce was only possible by the mechanism of enhanced co-operation. At least at the level of the methodology of private international law, there appears to be a rift between the Member States that are bound by Rome III and those that are not. The reduced level of universal acceptance can also be demonstrated in respect of maintenance, as Denmark and the United Kingdom is neither bound by Chapter 2 of the Regulation 4/2009 nor the Hague Protocol 2007.

3.1.3. EU PIL legislation and the relation to international PIL instruments

The relationship between EU PIL legislation and international PIL instruments can be discussed from various perspectives.

The main question is to what extent EU PIL legislation replaces international PIL instruments to which the member states are also bound. The traditional approach has been that Member States were allowed to apply a specialised convention. Examples in respect of applicable law are the continued application of the Hague Agency Convention 1978 and the Hague Road Accidents (Applicable law) Convention 1971 by some Member States. The Brussels I Regulation in principle allows the application of specialised conventions (Article 71, Brussels I). Recent case law of the CJEU seems to restrict the possibilities to apply Article 71.

The Brussels I Regulation and its predecessor also serve as a blue-print for the Lugano Convention 1988 and 2007 that apply for the EEA Member States. An attempt to find world-wide acceptance of the rules of the Brussels Convention failed during negotiations of the Hague Conference around the turn of the millennium.

The most recent phenomenon is the interaction between the EU PIL legislation and the international PIL instrument, now demonstrated by the Maintenance Regulation and the Hague Protocol 2007. The EU PIL instrument and the international PIL instrument are combined, not seen as alternative or competing instruments.

3.1.4. Further legislation by specialised instruments or restructuring through codification

The academic debate in some Member States appears to be very much in favour of the creation of a code on private international law. Conferences in France and publications in Germany demonstrate that many scholars believe that the steps should be taken in that direction.

For the purpose of this report, a meeting was organised in The Hague bringing together a small group of scholars from various Member States. They had not been asked beforehand what they thought of the prospect of a code.

In the course of the discussion, the prevailing sentiment was that the best way forward would be through further development of instruments concerned with isolated issues of private international law. Although it was recognised that there were questions in respect of general principles of private international law that would be similar for some instruments, a final decision on codifying these general principles could better be taken once the necessary

separate instruments had been completed. The codification, if this was widely supported by the Member States, could better be undertaken once the separate instruments, or the 'gaps' had been dealt with.

An argument in favour of continuing with separate instruments is that the law is becoming more and more the work of specialists. Private international law is traditionally a discipline that offers a 'helicopter view' of the law and that is known for its own, well-structured reasoning. Scholars in private international law traditionally tended to switch between questions of family law, patrimonial law and procedural law. The problem is that those who practise the law appear to have become more and more specialized in certain areas of the law. This has an effect on the preparation of legislation, as contact with specialists will be necessary. Yet the practising lawyer who takes an interest in the choice of law rule for subrogation will most probably not be interested in divorce, and vice versa.

It also appears that the process of becoming acquainted with new legislation will progress more smoothly by means of specialised instruments. A family lawyer will take an interest in instruments on family law, specialised publications will sooner mention a specialised instrument than a general instrument. An example of the present level of specialisation offers the recovery of maintenance. The daily work of the Central Authorities is often carried out by paralegals. For them staying informed on Regulation 4/2009 will be most relevant. It is also understood that many practitioners deal with private international law problems only occasionally, as part of a practice that specialises on a certain area of the law in their Member State, e.g. family or insurance law. There was no conviction that a smaller 'code' would be necessary to ease the task of practitioners and judges. The need to deal with many diverse instruments was seen as a fact of modern professional life.

An interesting suggestion was to undertake the work on at least some of the gaps within the framework of the Hague Conference. The experience with the Hague Protocol could serve as example for steps to modernize several Hague Conventions of the 70s that happen to coincide with gaps in the current EU framework: e.g. Road Accidents, Marriage, Agency.

3.1.5. The impact of harmonisation or unification of substantive law by the EU

The requirements of the internal market and the objectives of the European judicial area can also be achieved by further harmonisation of substantive law. However, Treaty competence is in general more limited. Harmonisation of substantive law is more far-reaching and cannot always be justified in view of the proportionality and subsidiarity of EU-legislation. Existing substantive EU law, primarily laid down in Directives, can have an influence on private international law. For example, the various consumer Directives often contain a 'scope-rule' and are mandatory law for the cases falling within the scope. This particularly affects the freedom to choose the applicable law. Some (older) directives have a somewhat vague scope rule. For example, Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, provides in Article 7(2) that Member States shall take the necessary measures to ensure that consumers are not deprived of the protection afforded by this Directive as a result of opting for the law of a non-member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States. It is not clear what precisely constitutes such a 'close connection'. Article 6, Rome I also contains rules on consumer protection, but the definition of what constitutes a consumer contract under this Regulation and under the various directives, does not always run parallel. The new consumer directive, Directive 2011/83/EU on Consumer Rights which will, as of 1st June 2014, replace four existing directives, including the previously mentioned directive, is clearer in this regard. It provides in Article 25 that if the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive. Recital 10 further states that it leaves the application of the Rome I Regulation unaffected. This Directive consequently does not 'interfere' with the conflicts rules of Rome I.

A clear example where the freedom to choose the applicable law under private international law rules was limited is the ECJ decision in *Ingmar* (C-381/98) (see Chapter 1.3.3.) Articles 17 and 18 of Directive 86/653/EEC on Agency were held applicable to the termination of a commercial agency agreement between an agent active in a Member State and a third state principal, in spite of a choice of law clause in favour of the law of the third state.

An important development is the proposed Regulation on a Common European Sales Law (CESL), COM(2011) 635 final. It allows parties to opt for these sales rules in cross-border cases. These sales rules are to be regarded as a second national regime of sales law within the Member States. This would also mean that, as the Commission intends, the conflict rules aimed at protecting consumers laid down in Article 6, Rome I, no longer apply. This is a clear example of how substantive law harmonisation, though be it through an optional instrument, has an impact on the operation of private international law and partially takes over the role of private international law.

3.2. Expansion of the existing EU legislation

3.2.1. Pressing issues in the additions identified

In the discussion of the gaps, addition to the framework was deemed most necessary for the so-called 'systematic' gaps, irrespective of the question whether filling these gaps would be feasible. In the course of this process it was also possible to distinguish between general gaps in the area of the law of obligations and gaps in the area of family law.

From the EU perspective it could be argued that measures relevant for the Single Market are most pressing. There is also the constraint that action in respect of family law will require unanimity. It seems possible that actions in respect of family law may sooner lead to a debate on the subsidiarity principle. Reasoning from the general perspective of the EU, it would appear that measures in respect of non-family law should be prioritised. The 'gaps' in that area for which additions were deemed necessary are mainly in the field of applicable law.

In respect of family law, if unanimity cannot be reached, the conclusion could well be that the only way forward is through enhanced co-operation. It is yet another question whether enhanced co-operation is a desirable path to choose.

3.2.2. A code on private international law as a novel option

In the current situation the step towards a code on private international law may not be the most promising option. As will be set out hereunder, for the time being an approach on three different areas may lead to quicker results. The three areas for which activities should be developed are:

- civil procedure (jurisdiction and recognition and enforcement) for civil and commercial cases;
- applicable law for general matters in the field of the law of obligations, outside of family law; and
- family law for all three general problems of private international law: jurisdiction, applicable law, and recognition and enforcement.

The existence of a bundle of separate instruments relevant for private international law is not seen as overly problematic for the time being. The usual process of codification in the EU (see Chapter 5.1) may eventually be a sufficient improvement to overcome the disadvantages of that situation.

PART II: EXTENDING THE FRAMEWORK TO A CODE

The development of the framework of private international law, although still not complete, has led to a debate, at least amongst European scholars of private international law, on the desirability of creating a European Code on private international law. Addressing this question was part of the study description for this research study. The question, whether a European code is necessary, cannot be separated from the question whether the current framework can be extended. This part of the study will deal both with aspects connected to both to extension of the current framework and the option of creating a code on private international law.

4. CONTRIBUTIONS AND ADVANTAGES FOR THE STAKEHOLDERS

4.1. Which stakeholders can be identified?

General remarks

The identification of the stakeholders in respect of legislation on private international law is problematic. Guidance was first sought in the multitude of reports that have been drawn up for the European Commission since 2000 and in which identification of the stakeholders is often part of the analysis. After perusal of recent reports, it transpires that the authors of these reports mostly struggled when they had to deal with the identification of stakeholders and the impact that legislation would have in the area of private international law, or legislation closely related thereto (e.g. notification).

In an impact analysis on aspects of the revision of Brussels I the following groups were identified as stakeholders: a. businesses and consumers; b. legal and other intermediaries/authorities; c. the wider European economy.³² In the Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality (JLS/2007/C4/028) the focus appears to have been on the position of the Press and Media Associations, as they are identified in the report as one of the main stakeholders³³. Although the report recognises there may be other stakeholders, their identity remains hidden³⁴. The Impact Assessment on the Ratification of the Hague Convention on the Choice of Court Agreements by the European Community³⁵ provides a more refined, if yet quite abstract overview of the stakeholders. The stakeholders are categorised as follows: a. Member States and institutional bodies; b. NGO’s, consumers’ and interest organisations; c. Industry, entrepreneurs associations and companies; d. ‘law’ (presumably: lawyers) and academia.

It seems typical that it is not explained why groups are stakeholders, or how their interest should weigh in the decision-making process. The following remarks on the stakeholders of a private international law code are tentative. Some reference will also be made to recent academic writing, which takes a much more limited view on the relevant stakeholders.

³² See: Centre for Strategy & Evaluation Services: Data Collection and Impact Analysis – Certain Aspects of a Possible Revision of Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (‘Brussels I’) - 17 December 2010, p. 18-19.

³³ Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality (JLS/2007/C4/028), Final Report, p. 31-32.

³⁴ See the Comparative Study (JLS/2007/C4/028), Final Report, p. 34.

³⁵ GHK; December 2007.

EU nationals

EU nationals would be one of the main groups of stakeholders, although it could be accepted that they will generally not be very aware of the impact that a code may have on them. It could also be debated whether a code offers clear benefits for EU nationals over the current situation of separate instruments. Nevertheless the position of EU nationals is important as it raises the question to what extent a code or legislation on private international law in general, should not only contain rules on those who are living in the EU (or in the vocabulary of private international law: are habitually resident in the EU), but should contain provisions relevant to EU nationals living outside the EU. A practical example is the actual case of an Italian husband and his Dutch wife who married in an African state and lived there for a number of years. The wife, a diplomat, subsequently moved for her work to an Asian state, and her husband followed. When the couple wished to divorce this turned out to be impossible in the Asian state of residence. Under the current EU laws, jurisdiction under Brussels II-bis is not possible as long as both spouses are living outside the EU. Nor was jurisdiction available, apparently, under the Dutch or Italian residual rules on jurisdiction in divorce cases. Under the circumstances, jurisdiction in the EU would only have been possible for spouses who share the same EU nationality.

A similar argument could be made in respect of companies incorporated under the law of an EU Member State. For them as well, if they carry out their business outside the EU, there is the question to what extent the EU offers jurisdiction and what law would be applied to their incorporation.

In case EU nationals, whether natural persons or legal persons, are residing within the EU, their interests are similar to those of EU residents.

EU residents

EU residents, natural or legal persons residing in the EU and who may be nationals of an EU Member State or of a third state, would be the prime stakeholders of private international law legislation. Again, it is another matter whether their interest is different when the private international law legislation is codified instead of contained in separate instruments. The bottom-line is that as a consequence of the European integration many borders have been removed. As a consequence, all those resident in the EU are more and more likely to engage in some sort of private law contact with residents from other EU states. This could be the consequence of their free will, e.g. a marriage with a spouse from another EU Member State, it could be something they had rather avoided, e.g. a traffic accident in their home town caused by a driver from another EU Member State. All such cases raise issues of private international law. Legislation on private international law on the European level should help increase legal certainty and help remove differences in treatment that are a consequence of national laws.

EU businesses

With respect to businesses active in the EU, their situation is in principle similar to that of EU residents. The additional element that increases the relevancy of legislation on private international law for businesses is the Single Market. Making full use of the opportunities of the Single Market will lead to engaging in cross-border commercial activities.

The EU institutions

Preparing an increase of current EU legislation on private international law will place an extra burden on EU institutions, notably the Commission and Parliament. With respect to the burden that could be placed on these institutions while preparing legislation, reference may be made to the legislative experience in the Netherlands, where often an attempt was made to take in the views of practitioners and interest groups. The systematic gaps that have

been identified are diverse by nature and will have a bearing on diverse sections of society. Profound differences can be expected in the composition of the groups that will take an interest in legislation on property law (e.g. banks, industry and commerce, project developers, but also civil notaries, national registries) and those that are interested in legislation on the recognition of marriages.

Once the extension of EU legislation has been adopted, the extra burden will shift, in part at least, to the CJEU, as national courts will begin to request preliminary rulings from the CJEU. With respect to the burden of private international law cases that have to be decided by the CJEU it must be mentioned that the possibility to request preliminary rulings has for a long time been restricted to instruments on civil procedure, notably the Brussels Convention, later the Brussels I and II-bis Regulations.

The regulations on applicable law are still fairly recent and cases that will eventually lead to requests for preliminary rulings are now probably still before national courts. If the experience with the Brussels Convention is anything to go on, requests for preliminary rulings on the Rome I and II Regulations will probably increase. A codification of private international law in the EU, covering the areas not yet regulated, will mean that the number of issues that may potentially lead to a preliminary ruling will increase.

The position of the CJEU or its ‘stake’ in a future code on private international law cannot be separated from the general discussion on the caseload of the CJEU, and the possible solutions to remedy this situation. A study on this problem in relation to private law is forthcoming.³⁶

The legal profession

In a recent publication, Kieninger attempts to identify the stakeholders specifically in view of an EU codification of private international law.³⁷ According to Kieninger it would be utopian to target the ordinary citizen with such a codification. As the problem of private international law is unknown to someone not educated in the law, the purpose of a codification could never be that the law applicable to a cross-border situation could be easily understandable to him from a legislative instrument. Legislating for the citizen could not be ground for a codex on European private international law; at best the target would be the ordinary lawyer, dealing with practical matter³⁸. Another argument, not the main argument, for codification would be that systematic approach to the law would ease interpretation and application of the rules³⁹. From the assumption that easing the task of lawyers dealing with private international law in practice is the main purpose of a codification, Kieninger criticises the current trend towards enacting a complete set of private international rules linked to one issue, as is the case in the Maintenance Regulation, or in the future regulations on matrimonial property and property of registered partners. The disadvantage of such specialised instruments would be that in practice such issues are frequently linked to yet again other issues: maintenance is often part of proceedings on the consequences of divorce, as are parental responsibility and matrimonial property.

Apart from the difficulties surrounding the process of identifying the stakeholders, there is the problem of determining the significance of their various interests.

³⁶ See the future publication from Rösler, *Europäische Gerichtsbarkeit auf dem Gebiet des Zivilrechts – Strukturen, Entwicklungen und Reformperspektiven des Justiz- und Verfahrensrechts der Europäischen Union*, to be published in 2012 by Mohr Siebeck, Tübingen.

³⁷ Kieninger, in: *Festschrift Von Hoffmann, Grenzen überwinden – Prinzipien bewahren*, 2012, p. 184-197).

³⁸ Kieninger, cited previously, p. 188.

³⁹ Kieninger, cited previously, p. 189.

4.2. Contributions and advantages that can be identified

4.2.1. Facilitation of cross-border transactions, reduction of costs, acceleration of legal proceedings

Filling the gaps in the existing framework would suggest that this will further facilitate cross-border transactions, that it will reduce costs, and that it may help to accelerate legal proceedings. It is difficult to quantify this assertion, but it appears to be generally accepted that clarity on the content of the private international law rules will remove obstacles for businesses and consumers to enter into cross-border transactions. Removing obstacles would in principle also lead to some cost reduction and would in principle speed up legal proceedings. It seems necessary, however, to make some caveats in respect of these claims.

Although in abstract further extensions to the framework would serve these objectives, much will depend on the actual content of the rule. The current rules of private international law, as developed in the EU for more than 50 years, have also been shaped to take other interests into account. Such as by designating the law that is most closely connected to the case or that will best protect the interest of a weaker party, or by conferring jurisdiction on the court most suited to deal with the case or that is more easily accessible to the weaker party. The desire to offer judicial protection may lead to more refined rules that can sometimes complicate the task of the courts. An example is the proliferation of jurisdiction that is possible in tort cases, when the aggrieved parties are domiciled in various Member States. Another example is that the modern choice-of-law rules developed by the EU will in principle oblige a court to apply a foreign law if this is designated by these rules. This contrasts with the simplification that is generally attributed to application of the *lex fori*, which is more universally accepted in the national private international law rules of common law jurisdictions and which is sometimes advocated in legal writing.

It would appear, however, that clarity on the content of the private international law rule will eventually be beneficial, even if this is a rule that places a greater burden on those who have to deal with the rule. It may well be that the true cost reductions are yet to be made in the future, once courts and practitioners have become more acquainted with the current and future framework. The true cost reduction for the time being could well be that clarity on the applicable private international law rules will allow parties, citizens and businesses, to anticipate the consequences of these rules. It is also typical of the EU that it offers citizens and businesses the opportunity to engage in activities across borders and to do so in very different ways. Citizens may move their habitual residence between various Member States throughout the course of their life, while businesses may be fixed in one Member State, yet may have customers in all 27 Member States. In view of this specific character of the EU it seems necessary to accept that there can be greater burdens on those who have to deal with private international law cases.

4.2.2. Other contributions and advantages

In order to identify the contributions and advantages of further additions to the European framework of private international law, it appears useful to refer to the 1999 Tampere conclusions stating that in a genuine European Area of Justice, individuals and businesses should not be prevented or discouraged from exercising their rights. Added to this can be the focus of the 2009 Stockholm Program, seeking to promote, *inter alia*, the full exercise of the right of free movement. As the citizens of Europe make increasing use of their right of free movement, it is to be expected that they will increasingly derive rights (or obligations) from a legal relationship with an international character. This may be the case for the young

Greek academic who now seeks employment in Germany⁴⁰ or the Italian woman who has a family of four with another woman from Finland⁴¹.

It should further be noted that many rights that deserve protection originally derive from a purely national situation. The British couple moving to the sun of Southern Europe after working in London for 30 years will wish to know whether this has any bearing on a trust they created while living in England. The German bank that financed the milking installation of a cattle farmer will need to know whether a security right on this installation is respected when the farmer wants to move the installation to his large new farm in Latvia. Making use of the possibilities created by the EU will mean that citizens and businesses will be confronted with issues of private international law. As long as the private international law rules are neither harmonised nor unified, it will be more difficult for citizens and businesses to deal with the legal consequences of crossing borders.

⁴⁰ See the International Herald Tribune of 28 April 2012: ‘Brain Drain Feared as German Jobs Lure Southern Europeans’.

⁴¹ See the Finnish-Italian same-sex couple depicted in the International Herald Tribune of 25 July 2012: ‘On Gay Marriage, Europe Strains to Square 27 Interests’.

5. THE CONTRIBUTIONS AND ADVANTAGES OF A COMPREHENSIVE CODIFICATION (A CODE)

5.1. The difference between a code and separate legal instruments

5.1.1. What is understood by a 'code'?

The difference between the meaning of codification on the European level, and the meaning of codification as it is understood on the level of national European legal systems, has been set out clearly by a group of authors (Voermans, Moll, Florijn, Van Lochem) in 2008:

"In the EU context the concept of codification has a distinct meaning. 'Codification' is, according to point 1 of the Interinstitutional Agreement of 20 December 1994, the procedure whereby the acts to be codified are repealed and replaced by a single act containing no substantive change to those acts. This concept of codification differs from codification as it is commonly understood in continental legal systems. There the first meaning of the concept of codification is: 'lying down into a Code'. Dating back as far as the Codex Justinianus, the original idea of codification entails the enshrinement of the whole of the existing law on a given subject – even if it stems from different sources like customary law, case law and statutes – in one legislative text, a Code. This notion of codification entails in many EU Member States more than the simple procedure of assembling pre-existing legal texts, as for instance the Portuguese and Polish rapporteurs in the survey observe. Codification in this sense goes beyond the technique of mere assembly of rules on a given subject: it often requires additional harmonization of these rules, thus creating a body of provisions that is based on common principles and constituting a common, integrated system. Continental legal systems traditionally tend to place value in the systematization of law into elaborate codes (Civil Code, Criminal Code, etc.) The idea of codification, however, as the drawing up of an elaborate Code on a given subject of law has a totally different denotation than the idea of codification as a 'sweeping up'-process. This is why, for example, in Slovakia the term 'big codification' is used to set the process of setting up a Code apart from simple 'codification', indicating the process of piecing together different related parts of law on a given subject into a compiled single act. Much in the same way the term 'codification' in Spain is exclusively used for the process of drafting a Code."⁴²

Voermans *et al.* further demonstrate that the meaning of the terms codification and consolidation differ considerably between the legal systems of the EU Member States, although they see some common features, if semantics are left to one side. At the national level, codification is understood as a process whereby different parts of law on a related subject are integrated into a single act. Typically, codification involves the repeal of former acts replacing them by new ones or any other form of legislative substitution. Consolidation is not a legal act, but more a regrouping of legal acts, without having any 'real' effect⁴³. Voermans *et al.* eventually make a distinction between four main 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; d) codification with recast, whereby some extra elements are added to the original or pre-existing acts⁴⁴.

⁴² Footnotes omitted, cited from: Voermans, Moll, Florijn, Van Lochem: Codification and consolidation in Europe as means to untie red tape, *Statute Law Rev* (2008) 29 (2): 73-74.

⁴³ See in more detail and with further references: Voermans and others (2008), p. 74.

⁴⁴ See Voermans and others (2008), p. 79-80.

5.1.2. Benefits traditionally attributed to a ‘code’

Taking in some of the publications that have appeared in recent years in relation to the codification of private international law, one cannot escape the impression that the refined distinctions possible in respect of what is understood by 'codification' on the European level are not always taken into account. Often the term codification of private international law appears to have been used in the original, traditional sense of laying down a code that enshrines the law in one legislative act. Calls for codification on the European level appear to be linked to the disappearance of national private international law legislation⁴⁵ or, more or less the opposite, a hope that Europe will be prepared to fill a vacuum left by the national legislature (as could be the case in France).

Any choice on the direction to be taken by the European legislature in respect of the 'codification of private international law' should not be made without bearing in mind the various possible types of codification as distinguished above. It should also be borne in mind that on the European level codification in principle means the procedure whereby the acts to be codified are repealed and replaced by a single act containing no substantive change to those acts (Interinstitutional Agreement of 20 December 1994, point 1). An important facet of codification on the European level is reduction of the volume of legislation.

At the national level, in particular in relation to codification of private law, e.g. in a civil code, the prevailing idea is that a 'code' will help the systematisation of law. Probably the idea is also that the systematisation of the law will mean that the code can lead to a more compact document, as provisions that recur in the separate acts, only need to be laid down once. On the other hand, the experience with modern civil codes appears to be that codes on substantive private law have become more and more detailed. The Dutch Civil Code of 1992, often seen as the European front-runner of civil law codification after the Second World War, now consists of 10 different Books and replaced a 19th century code that originally only contained approximately 2,100 articles. The First Book of the Dutch Civil Code, on Family Law, already contains 462 articles. An article of the modern code may be composed of numerous sub-articles, whereas a full article in the 19th century Code often only ran to one sentence. A modern substantive code of the 20th century may sooner contain a written rule that is a necessary refinement for the application of the general rule. A refinement that under the traditional codes of the 19th century would have been developed in case law as there would only have been the general rule. The need for such refinement may also exist in the current legislation on private international law. An example would be the different rule on mandatory rules in Rome I and Rome II.

5.1.3. The current overlaps between the existing instruments in the framework

It cannot be denied that there are overlaps between the existing instruments. These overlaps are concentrated on rules of a general nature. To assess the overlaps, the nature of the private international law problem regulated by the instrument is relevant. There are overlaps between the (parts of) the various instruments on applicable law and between the various instruments on jurisdiction and recognition and enforcement. An overlap would appear to exist mostly between the various instruments on applicable law, as these tend to make use of references to well-known concepts of private international law, such as public policy, renvoi and mandatory rules.

Overlaps between provisions on applicable law

The instruments dealing with applicable law (whether solely dealing with applicable law, such as Rome I and Rome II, or partly, as is the case in the Succession Regulation) tend to have provisions on the following:

⁴⁵ As may be the case in Germany, see Kieninger (2011), p. 186.)

Public policy of the forum

See Article 21, Rome I, Article 26, Rome II, Article 12, Rome III, Article 35, Succession Regulation and Article 13, Hague Protocol Maintenance (Applicable law). The provisions may be worded slightly differently, but the result of their application should be similar in practice.

Overriding mandatory provisions

See Article 9, Rome I and Article 16, Rome II which are worded differently. It cannot be excluded that these provisions will lead to different results. Rome III, the Succession Regulation and the Hague Protocol do not contain a special rule on overriding mandatory provisions.

Renvoi

See Article 20, Rome I, Article 24, Rome II, Article 11, Rome III and Article 12, Hague Protocol, which all exclude *renvoi*. See however Article 34, Succession Regulation, which allows *renvoi* under certain conditions.

Similar rules are also included in case the choice of law rule refers to the law of a state that is composed of several territorial units that have different legal systems or which has different systems of law or sets of rules applicable to different categories of persons. See Articles 14 and 15, Rome III, Articles 36 and 37, Succession Regulation and Articles 16 and 17, Hague Protocol. Article 26, Rome II contains a rule on states composed of territorial units. The European instruments also share the principle that the law designated by the instrument will be applied, regardless of whether this is the law of a Member State (Article 2, Rome I, Article 3, Rome II, Article 20, Rome III, Article 20, Succession Regulation). Article 2, Hague Protocol contains the same principle.

5.1.4. Whether these current overlaps will also be relevant for the proposed additions

It has to be expected that some of the general rules set out above and which were already contained in the instruments on applicable law will also find their way into instruments that would address the gaps identified in this report. It is not completely certain that such instruments will automatically adopt the same rule. An example is that *renvoi* may have been excluded in Rome I, Rome II and Rome III, but nevertheless has a limited role in the Succession Regulation. Another example is the problem of overriding mandatory provisions, which found its place in Rome I and Rome II, but has been left out from the other instruments. It appears that choices will need to be made by the legislature when dealing with the gaps for which additions are proposed.

A decision on the need for the adoption of so-called general principles in EU legislation is better made after the gaps have been filled. It should be remarked that if the codification were to have the meaning found in the Interinstitutional Agreement of 20 December 1994, this should be a relatively easy task.

5.1.5. Contributions and advantages of a code for the stakeholders

This report takes the view that although the current framework now regulates many questions of private international law, there are still important gaps that must be addressed. Addressing these gaps should have priority over the question whether a code is necessary or not. For the institutions preparing legislation on the gaps that are still found in the framework there are at least two very different considerations to take into account. The first is the unanimity required in the area in family law. As explained, many important gaps can be found in the area of family law. The second is that the work on legislation to fill in the existing gaps will also need to involve European citizens and businesses, or at least

representatives of groups of citizens and businesses. It also requires technical expertise of very different areas of the law. In order to ease the tasks of the institutions involved in the legislative process, and in order to prevent a situation where the legislative process is halted as the required unanimity cannot be reached, it would be preferable to deal with each gap separately, and not to combine the work on the gaps.

With respect to legal practice it must also be observed that legal practitioners tend to specialize in certain aspects of private law. It is safe to assume that a divorce lawyer will take a strong interest in Regulations Brussels II-bis, Rome III, the Maintenance Regulation and the future regulation on matrimonial property, but that a corporate lawyer will take little or no interest in these instruments. Also, some of the existing instruments are in practice applied by professionals who did not train as lawyers, but who have to deal with the instrument as it is relevant for their profession or occupation. Reference could be made to staff of the various central authorities, who will in principle only deal with one of the instruments of the framework, e.g. the Maintenance Regulation.

6. THE APPROACH FOR A CODE – GRADUAL HARMONISATION OR SIMULTANEOUS ADOPTION

6.1. Experiences from various member states

6.1.1. The Netherlands (gradual adoption)

The step-by-step method may be understood as a method whereby first legislation is designed for distinct various issues, after which the separate acts are consolidated in a comprehensive act or code. The rationale of this working method was to gain experience with legislation in an area that had previously mostly been based on case-law. The choice for a gradual approach was also informed by the wish to adhere to new treaties that were destined for ratification. After 1980 the Netherlands became party to a host of private international law treaties that are part of the codification and which are addressed in Book 10.

6.1.2. Belgium (simultaneous adoption)

The Belgian code is the result of scientific research, including comparative analysis and empirical research, in co-operation with specialists in various fields of law. From the beginning the aim was to set up a complete Code of Private International Law. Thematic consistency was considered an important aim of the codification.

See: J. Erauw, *Het voorstel van Belgisch wetboek van internationaal privaatrecht en zijn algemene bepalingen*. WPNR 6537 (2003), p.481-490.

6.1.3 Poland (simultaneous adoption)

The Polish simultaneous codification has a historic justification. The nation was divided between three countries for more than 100 years preceding the independence regained in 1918. The Codification Commission for civil and criminal law, which convened the following year, aimed at delivering an original, modern set of rules, instead of adopting a template borrowed from a previous occupying country. This effort resulted in the adoption of the Private International Law Act of 1926, subsequently replaced by another codification, enacted by the communist regime in 1965 (the 1965 PIL).

The discussions on the necessity to amend or to overhaul the 1965 PIL started in early 90s. In 2002 the Private International Law Division of the Civil Law Codification Commission (CLCC) was tasked with preparing a draft of an entirely new PIL. In 2005 the CLCC approved the draft but further amendments were introduced in 2006-2008. According to the official explanations accompanying the project, its aims were: harmonisation of the Polish PIL with EU law, modernisation and filling the gaps of the 1965 PIL codification.

6.1.4. Critical analysis of gradual harmonisation as opposed to simultaneous adoption

It appears that in the three Member States that have been analysed, little debate took place on the choice between gradual harmonisation as opposed to simultaneous adoption. In part the choice appears to have been a consequence of decisions made from the outset. In Belgium, the wish was to make a comprehensive code on private international law, and to do so in accordance with scientific research. In Poland, the pressure of history appears to have prompted the codification of a single instrument on private international law. In the Netherlands, a cautious approach to legislation was followed as the law was mainly based on case law. The gradual approach in the Netherlands also appears to have been influenced by

the circumstance that the Netherlands is usually quick to adopt the Hague Conventions on private international law. The experiences in Poland and Belgium appear to demonstrate that simultaneous adoption can be a consequence of an event that ‘triggered’ the desire to enact a comprehensive instrument on private international law. The experience in the Netherlands appears to be the result of a wish to keep in step with the gradual development of private international law that was taking place on the international level (in the Hague Conference and in the EU) and on the national level through case law and legal writing. It should be noted that in the Netherlands it has long been debated whether a national codification of private international law would effectively contribute to the already on-going development of private international law.

6.2. The most suitable solution in view of the EU perspective

6.2.1. What must be taken into account?

Preserving the characteristics of the current framework

It is thought that the essence of the existing framework is characterised by solid legislation in respect of civil procedure in civil and commercial matters, with at the basis Brussels I Regulation and its predecessor the 1968 Brussels Convention. The interpretation of these two instruments has been well developed in the case law of the CJEU since the 70s.

Another characteristic of the current framework, although less well developed, is the matter of the applicable law in non-family law matters. The main product was the Rome Convention and some directives. The main products now are the Rome I and Rome II Regulations. It is typical for the state of development that these instruments have not yet been developed much in case law of the ECJ. As there is at present an absence of guiding case law from the CJEU, it seems difficult to add on to the legislation in force, e.g. by setting down principles. It could well be that future CJEU case law will develop new principles, not known in the traditional analysis of private international law, but stemming from the result of the application of principles of general community law. The decisions on the impact of the freedom of establishment for company law or the European citizenship for the name of natural persons could just be the beginning of such a development.

The last characteristic is that family law has a special place within the community legal order. Legislation can only be undertaken if there is unanimity in the Council. It can also be observed that on the level of the national legal systems, family law is regularly seen as a specialized area of private law, often applied by specialized courts. On the other hand, although the special position of family law must be respected, general principles of EU law can impact on this particular area of private law. It has long been accepted that differences between certain national rules governing jurisdiction and enforcement can hamper the free movement of persons and the sound operation of the internal market.⁴⁶ Article 18 EC on the free movement of persons precluded the application of a German conflicts of law provision on the surname in *Grunkin Paul* (C-353/06). A practice followed by Belgian authorities when registering the name of children who have both a Belgian parent and a parent from another EU member states recently prompted the European Commission to refer Belgium to the Court of Justice of the European Union for hindering the right to free movement of these children. Under the Belgian practice, these children would only be registered under their father’s surname.⁴⁷

The best choice for the EU

Continuing a programme of gradual adoption is to be favoured. To an extent, the discussions on certain instruments should take place in consultation with the Hague

⁴⁶ See recital (4) of Regulation Brussels II (1347/2000), now repealed.

⁴⁷ See the European Commission’s press release of 27 September 2012, IP/12/1021.

Conference, with a view to modernizing certain Hague Conventions, as has been achieved in respect of maintenance. It is accepted that there are underlying principles of PIL, but it is not thought that these principles currently necessitate the creation of code, in the meaning of a codex. It cannot be excluded that EU law will develop further and develop some principles of EU PIL. The discussion on PIL principles may perhaps be compared to the discussions that take place in respect of other principles of private law. It is however advisable that the academic debate is continued.

7. WHETHER A CODE IS ACHIEVABLE AND THE USE OF ENHANCED CO-OPERATION

7.1. A PIL code and the need for supporting national legislation

During the Expert Meeting it was thought that the need for supporting legislation would be limited and would not be an obstacle to further EU legislation. In general it was explained that regulations on applicable law do not create a need for supporting legislation. There is a need to do so for instruments on procedural law, but this should not pose difficulties.⁴⁸ It does however appear that when legislation is laid down in a regulation, as is the case for the current framework, the role for the national legislature is limited. A Dutch writer who as a government official was closely involved in the making of the Netherlands private international legislation does however remark that '(e)ven though the precedence of treaty law over national law follows directly from the Dutch Constitution, and the precedence of European Regulations, from Community law, instruments on PIL are usually incorporated in Dutch national legislation by an explicit reference to the title of the instrument or instruments concerned'.⁴⁹

7.2. The use of enhanced co-operation

Pointing out the possible 'advantages' of enhanced co-operation is perhaps a contradiction in terms. The decision on the basis of Article 329(2) TFEU to make use of enhanced co-operation is seen as an option of last resort, only to be taken when the targets to be pursued by the co-operation cannot be met by the EU as a whole within a reasonable time. The Rome III Regulation was the first piece of legislation to be based on enhanced co-operation and was followed by a proposal for legislation in the field of patent law in 2011 (see Council Decision 2011/167/EU). The result of enhanced co-operation is that within the Union there will be two groups of states, those who take part in the co-operation and those who are excluded. It must be recognised that there are signals on the horizon that such an approach, a two-speed Europe, may become necessary in respect of matters of general policy in order to deal with the difficult times we live in⁵⁰.

From the perspective of the Union, the main advantage appears to be that through enhanced co-operation it is still possible to reach certain political targets, although not for the Union as a whole. Even in a very different, non-legal analysis, it is difficult to determine the pros and cons of this situation and the final verdict may only be based on practical experience. Thus the economists Bordignon and Brusco concluded, *inter alia*, that forming an enhanced co-operation agreement might be the only way to find out if centralisation on a given function is beneficial⁵¹. With regard to the disadvantages of enhanced co-operation as a basis for EU policy, especially in the area of family law, the principal rule of Article 81(3) TFEU should be borne in mind, namely that the Council will act unanimously in matters of cross-border family law.

Limited to the area of private international law, the use of enhanced co-operation for Rome III Regulation may only have helped to further accentuate the rift between Member States that take a liberal approach to divorce and those that take a more cautious view. See the 2002 Report on Practical Problems Resulting from the Non-Harmonization of Choice of Law Rules in Divorce Cases (JAI/A3/2001/04) which already found that to achieve harmonisation of the choice of law rules on divorce "the profound differences in approach,

⁴⁸ On the problem in general, see Van Iterson, The Response of National Law to International Conventions and Community Instruments – the Dutch Example, *European Journal of Law Reform* 2012 (14). p. 3-16.

⁴⁹ Van Iterson (2012), p. 9.

⁵⁰ Cf. Piris, *The Future of Europe*, 2011.

⁵¹ Bordignon/Brusco: On Enhanced Cooperation, *Journal of Public Economics* 90 (2006) 2085.

ranging from an approach based on *favor divortii* to an approach that purports to be neutral but that in any case will not automatically favour a solution that will lead to a swift dissolution of the marriage, will be a serious obstacle" (p. 59). As the economic crisis since 2008 has shown, in some situations it may be more easily accepted, even by the Member States that do not participate, that there is a necessity to achieve political targets. Nonetheless, it is more difficult to accept such a necessity in the area of status matters. Although made in a very different type of analysis, the observations of Bordignon and Brusco that countries deciding to opt-out of the sub-union (which is created by enhanced co-operation) should be involved in the decision process of the sub-union, merit some attention of those who feel the current rift is unfortunate.⁵²

In respect of private international law issues, a critical remark on the practical effect of enhanced co-operation would be that the EU has not moved much forward compared to the period when Member States could still decide for themselves whether or not to ratify a (Hague) Convention on private international law. Enhanced co-operation also creates an extra complication with respect to the geographical scope of EU regulations, in addition to the complications that have been accepted as a consequence of the opt-in/opt-out mechanism in respect of the United Kingdom and Ireland and the exclusion of Denmark. It is also to be expected that the differences in approach that endure when instruments are based on enhanced co-operation will increase the number of attempts by litigants to avoid its application. In this respect the use of enhanced co-operation in family law matters is probably even more detrimental than in ordinary civil and commercial cases. It is widely accepted that commercial entities may favour a certain court to decide their international disputes and modern private international law allows parties to vest jurisdiction in a court by agreement. So if a jurisdiction adheres to a policy that is appreciated by litigants, they will agree, even in case of a dispute, to bring the case to a certain court. An example is the long-standing practice to bring all kinds of maritime disputes before courts in London. A practice that has become widely accepted by the private international law rules of the 20th century and which is allowed under Brussels I. In areas where forum selection is not possible or less easily allowed, such as family law and status, litigants can be enticed to be 'creative with the facts', e.g. in respect of their habitual residence, in order to find a more favourable court. Child abduction could be seen as the ultimate form of such behaviour. In respect of divorce, it must also be noted that at least some of the member states that do not participate in Rome III, apply choice of law rules that favour the granting of a divorce more easily than the rules of Rome III. A situation could develop that is comparable to the problems surrounding the differences between the national and the EU rules on immigration.

The consequences of enhanced co-operation in respect of the choice of law rules in Rome III are reduced by the effect of Brussels II-bis. This Regulation, applicable in all Member States except Denmark, guarantees the recognition of a divorce decree, both from states that apply Rome III and those that do not. If divorce had been regulated by a single instrument, comparable to the Maintenance Regulation (4/2009) or the future regulations on succession and matrimonial property, the lack of co-ordination and harmonisation would have been much more manifest. The lack of uniformity within the EU now is limited to the conditions of substantive law under which spouses can obtain a divorce. Jurisdiction and recognition of divorce decrees is still a matter of unified law (except Denmark). It must also be noted that when the first proposals were made to amend Brussels II-bis and to include provisions on the law applicable to divorce, the dispute on the law applicable to divorce was fought with a view to an entirely different issue. Article 8 of the Hague Maintenance Convention 1973, applied by most Member States, refers the maintenance rights between former spouses to the law applied to the divorce. The revision of the Hague Protocol 2007, which was adopted by the EU removed that rule. Today the law applied to the divorce is irrelevant for the right to spousal maintenance.

⁵² Bordignon/Brusco (2006), p. 2085.

Under the current situation, if unification were agreed, the main issue would be whether the United Kingdom and Ireland would opt-in and how the special situation of Denmark can be dealt with. If unification cannot be achieved, the question arises whether enhanced co-operation is the next best solution.

The arguments for pro-unification through the use of enhanced co-operation appear to be that such action would nevertheless promote uniformity between a group of states. The result of the codification effort would also be a clear statement to the Member States that do not participate. The result would demonstrate the unison that has been achieved amongst a group of states. Perhaps the common ground accepted through enhanced co-operation would serve as an example to the states that did not take part and would influence the case law and practice of their courts. For the citizens, inhabitants and companies of the states that take part in the enhanced co-operation, legal security would be increased as they would know that certain other states in the EU would apply exactly the same rules. In the abstract, the arguments in favour of unification would in principle not vary much whether the unification is achieved between all EU member states or only a selection of those states. To pursue unification of law, whether it is private law or private international law, is generally seen as commendable and as a contribution to the greater good.

An apparent advantage of the use of enhanced co-operation is that it allows like-minded states to reach consensus rather quickly. It could well be that instruments on alternatives for marriage, same-sex marriage or the recognition of trusts may be achieved much more quickly between some Member States. However, this advantage appears to be of limited value. It is unlikely that the willingness to co-operate will always exist between the same group of states. The consequence, in the long run, appears to be that enhanced co-operation for selected issues will increase the lack of harmonisation and complicate matters for the practitioner and for the subjects of law.

The example of Rome III appears to point to a number of counter-arguments as well. The EU is currently in a phase where unification has been achieved for a number of areas of private international law. If other instruments, which are only applicable in a select group of states, are added to the current achievements, this does not necessarily destabilise the pre-existing state of affairs. For a selected topic, the ‘agreement to disagree’ is regrettable, but does not impair the status quo. To some extent, the very fact that the status quo exists enables some states to continue on isolated topics by way of enhanced co-operation. However, if the speed or extent of enhanced co-operation were escalated, not for a selected problem, but for legislation dealing with all problems of private international law, such action may contain risks for the existing status quo. That risk would become real as soon as the states working together through the mechanism of enhanced co-operation would accept rules amending the status quo.

It may be thought that enhanced co-operation will not be detrimental to the status quo if this is completely respected. Nonetheless, one of the perceived benefits of a comprehensive codification is that it would increase the systematisation of the law. This desire is understandable, at least to lawyers trained under a Continental legal system, especially when the subject matter, private international law, is by its very nature highly systematic. If some states would agree on an instrument bringing together, for example, all current rules on applicable law (Rome I, Rome II, Rome III, the Hague Protocol 2007) it seems inevitable that systematisation will further influence the interpretation of the rule, in a way not possible when the rule is part of a specialised, dedicated instrument.

8. SUGGESTED STRUCTURE FOR A CODE, GENERAL PRINCIPLES AND RELEVANT ISSUES

8.1. The most suitable legislative instrument for a code

For reasons explained in the next paragraph, there may be another way to move forward instead of commencing work on a code. This alternative way would be better suited to the situation as it is currently understood. If the Member States would nonetheless find themselves in a position to agree on a comprehensive code on private international law, such a code would have to be adopted by a regulation.

Assuming that the comprehensive code on private international law would not be a 'codification' as this is understood generally under EU law, but an attempt to create a codex of private international law, its main purpose would be to bring together all existing instruments of private international law, and then bring on additional legislation in order to fill the 'gaps' in the current legal framework.

One characteristic of the present main regulations on private international law is that they are preceded by extensive and detailed considerations. Although these considerations have been dubbed as a solution to deal with issues on which no formal agreement can be reached, it appears necessary to take over the substance of these considerations into the new, codifying instrument.

8.2. The preferred structure for a code

The issue of the codification of EU private international law, understood as the desire to create a codex on private international law is increasingly gaining attention in the academic debate in Europe. During conferences in France the desire to achieve such a codification has been at the centre of the discussion and the prevailing trend of the contributions to these conferences has been in favour of such codification⁵³. Codification was discussed again at the end June 2012 at a conference in Germany, and again the impetus appears to be in support of codification.⁵⁴ The conference addressed the problems of general principles of private international law and their place in private international codifications, classification, preliminary question, closest connection, party autonomy, habitual residence, *renvoi*, mandatory rules, public policy, the application of foreign law and the principle of recognition. The papers of the conference had not yet been published at the time of concluding this report.

The purpose of this report is not to doubt the wisdom or sincerity of the scholars who are in support of comprehensive codification. The preferred solution advocated in this report should be understood as the result of the methodology that has been followed. An important element of the methodology was to bring together a group of experts from various EU member states.

The outcome of the discussion resulted in a view on the best way forward that is best described as a realistic balance between very different individual choices. The desirability of a comprehensive code was not met with universal support. On the other hand, some experts were sympathetic to the idea of codification. The prevailing idea was that it was doubtful that such an idea would be rapidly accepted by all Member States. Furthermore, approaches

⁵³ See especially: Fallon/Lagarde (eds.): *Quelle architecture pour un code européen de droit international privé ?* 2011.

⁵⁴ The conference "Brauchen wir eine Rom 0-Verordnung? Überlegungen zu einem Allgemeinen Teil des europäischen IPR" (Do we need a Rome 0 Regulation? Considerations on a general part of European private international law), was held on 29th and 30th June 2012 and organised by Professors Leible and Unberath.

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. Drafting a comprehensive table of contents for a future code was seen as an unrealistic proposition by several experts.

In the discussion on gaps, the question should also be dealt with as to what is to be regarded as a ‘gap’ from the perspective of the traditional analysis of private international law. There is also the question to what extent the traditional analysis of private international law should prevail over other considerations, most notably principles of community law. The institution best equipped to deal with that dilemma would be, for the time being at least, the CJEU.

8.3. Basic agreement on the contents of EU PIL legislation

In the current phase of development of EU private international law it is considered better to continue by filling the systematic gaps that still exist in the framework. Setting out, for example, general principles of private international law is a task that is better undertaken once these gaps have been filled and the courts have had more experience with the instruments of the current framework. Analysis of the case-law of the national courts and of the CJEU on the instruments of the current framework would be essential when undertaking that task. At present, the case-law in respect of many instruments is still underdeveloped, as they have only been in force for a relatively short period.

In order to fill the gaps it appears advisable to continue the approach that has been followed so far. This implies that new legislation should be developed for distinct areas of private international law, rather than a single instrument to cover the gaps. Some areas that still need to be dealt with have become highly specialized and will need the involvement of specialist lawyers. An example of the level of specialization is the research study recently carried out in respect of subrogation.⁵⁵

In order to fill the existing gaps it is wise to try and develop rules in co-operation with the Hague Conference. The experience with the Maintenance Regulation demonstrates the value of this approach. It was noted that the Hague Protocol 2007 was a revision of the 1973 Hague Maintenance Convention, and that some gaps in the European framework deal with matters covered by other Hague Conventions of the 1970s: Marriage, Agency. Ratification by the EU of the Hague Trust Convention was seen a viable option.

Consolidation of the codification, i.e. combining several instruments into one, would for the time being only be possible for the Rome I and II Regulations.

It appears to be possible to distinguish between three distinct areas within the framework. To an extent this distinction is already found in a more traditional analysis of private international law. The division into these three distinct areas happens to fit in quite well with the structure of community law;

The three areas that can be distinguished are:

- 1) Civil procedure in civil and commercial cases.

Essentially this is the realm of Brussels I Regulation, the Small Claims Regulation, the Undisputed Claims Regulation and the Insolvency Regulation. Some rules are further found in the Succession Regulation.

⁵⁵ Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person- May 2012.

2) Choice of law (applicable law) in non-family law cases.

Essentially this is the law now found in Rome I and Rome II, the Succession Regulation and, to an extent, in some directives on private law. There are still gaps in this area that should be filled.

3) Private international law for family law cases.

Essentially this area consists of the Brussels II-bis Regulation, the Rome III Regulation, the Maintenance Regulation and the future regulations in respect of matrimonial property and the property of unmarried couples.

The advantage of this approach is that it respects the achievements in respect of civil jurisdiction, which date back to 1968 and which have also been developed most in the case law of the CJEU. Leaving intact Brussels I Regulation would also help to maintain the close link between this Regulation and the Lugano Convention. The separate treatment of private international law for family law cases fits in well with rules on the decision process of Article 81(3) TFEU. Should unanimity not be achievable in this area, not even by application of the passerelle clause of Article 81 (3), resort could be had to enhanced co-operation. With respect to the private international law rules for non-family law cases, it must be understood that the rules on jurisdiction, recognition and enforcement are in principle already contained in the Brussels I regulation. Essentially rules on applicable law are lacking. It is further noted that the subject matter, non-family law, has close links to the Single Market. Again this ties in with the wording of the TFEU.

CONCLUSIONS

The existing gaps in the framework

When speaking of gaps it is useful to further distinguish between various types of gaps. The gaps in the current framework can be divided into three main categories. First of all there are gaps which are the willed result of territorial limitations to the scope of the EU legislation. Secondly, there are systematic gaps that arise when the current framework is compared to the separate problems that comprise the traditional problems of private international law. The current framework regulates most of these separate problems, but not all of them. Thirdly and finally, there are gaps when EU legislation provides that certain questions are deliberately omitted from the scope of an EU instrument, although from the systematic perspective these elements form part of the separate problem that is regulated by the instrument, e.g. contractual obligations. Furthermore, there are provisions in the framework which by their nature are open to interpretation. Such provisions should, however, not be considered gaps.

Additions proposed to the current framework

The true gaps in the framework are the systematic gaps, the subject-matter that is currently not regulated by the framework at all. In the area of the law of obligations, these gaps are:

- Property law
- Trusts
- Agency
- Corporations
- Arbitration

In the area of family law these gaps are:

- Marriage
- Registered partnerships and similar institutions
- Name of natural persons
- Adoption
- Parentage
- Protection of Adults
- Status and capacity of natural persons in general

A working plan for the EU – gradual or simultaneous adoption

It has been advocated that the path of gradual adoption should be followed. The gaps in the framework would need to be addressed before further codification is contemplated at all. An important argument for the path of gradual adoption is that the legislative work on each of the gaps that is still open will be demanding and should lead to the involvement of specialists of the various areas of law. It will be difficult to undertake this work all at once. Another argument is that the courts have only recently begun to apply and interpret many instruments of the framework. It seems appropriate to wait and see how the courts of the Member States and of the CJEU apply and interpret these new instruments on private international law. Lessons drawn from the case law could be integrated in a future code should this be desired in the future. A final argument is that work on legislation for some gaps, e.g. those that could perhaps be addressed through revision of Hague Conventions of the 1970s, ought to take place in the framework of the Hague Conference. Gradual adoption is also seen as the best way forward as a codification of private international law, if achievable, would also imply that the gaps in respect of family law are addressed. This will require a special legislative procedure and unanimity in the Council.

It is suggested that new legislation is developed for distinct areas of private international law, not a single instrument to cover the gaps, while ensuring coherence with other instruments. While working on such new legislation, the EU legislator could consider dividing its attention and efforts to three distinct areas of private international law that fall within the framework: civil procedure in civil and commercial cases in general (an area which is almost completed); choice of law (applicable law) in non-family law cases (raising issues that have a strong link with the Internal Market); private international law for family law cases (which will require unanimity in the Council). Directing its attention to these separate areas may aid the EU legislator to make progress with completing the framework.

The feasibility of an EU code on private international law

The feasibility of an EU code on private international law should be evaluated once the gaps have been filled. It must also be understood that the notion of codification in European law differs from the notion of codification in the law of the Member States. It must also be understood that the legal systems of some Member States do not have a tradition of codification. It is foreseeable that certain instruments, such as Rome I and Rome II, could be the subject of further codification within the meaning of European law. It is another matter whether a codification as is known in the internal law of certain Member States is feasible and desirable. A strong argument against is the yet largely underdeveloped issue of the impact of principles of general EU law on the application of EU instruments on private international law. It would be advisable not to undertake a codification - as the concept is understood in some Member States - until this area has been developed further and the gaps in the current framework have been addressed.

REFERENCES

Case Law Court of Justice European Union (in alphabetical order)

In re: A.

Judgment of the Court (Third Chamber) of 2 April 2009

A.

Case C-523/07.

European Court reports 2009 Page I-02805

Aguirre/Pelz

Judgment of the Court (First Chamber) of 22 December 2010.

Joseba Andoni Aguirre Zarraga v Simone Pelz

Case C-491/10 PPU.

European Court reports 2010 Page I-14247

Allianz SpA et al. v. West Tankers, Inc.

Judgment of the Court (Grand Chamber) of 10 February 2009.

Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.

Case C-185/07

European Court reports 2009 Page I-00663

Bidar

Judgment of the Court (Grand Chamber) of 15 March 2005

The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills

Case C-209/03

European Court reports 2005 Page I-02119

Cartesio

Judgment of the Court (Grand Chamber) of 16 December 2008.

CARTESIO Oktató és Szolgáltató bt.

Case C-210/06.

European Court reports 2008 Page I-09641

Christofer Seagon v. Deco Marty Belgium NV

Judgment of the Court (First Chamber) of 12 February 2009.

Christopher Seagon v Deko Marty Belgium NV

Case C-339/07

European Court reports 2009 Page I-00767

Daily Mail

Judgment of the Court of 27 September 1988

Case 81/87

European Court reports 1988 Page 05483

The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc

eDate Advertising GmbH and Martinez

Judgment of the Court (Grand Chamber) of 25 October 2011

eDate Advertising GmbH v X (C-509/09) and Olivier Martinez and Robert Martinez v MGN Limited (C-161/10)

Joined cases C-509/09 and C-161/10

European Court reports 2011 Page 00000

D' Hoop

Judgment of the Court of 11 July 2002.

Marie-Nathalie D'Hoop v Office national de l'emploi.

Case C-224/98.

European Court reports 2002 Page I-06191

F-Tex SIA

Judgment of the Court (First Chamber) of 19 April 2012.

F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud-Vilma"

Case C-213/10.

European Court reports 2012 Page 00000

Garcia Avello

Judgment of the Court of 2 October 2003

Carlos Garcia Avello v Belgian State

Case C-148/02.

European Court reports 2003 Page I-11613

Gemeente Steenbergen v. Baten

Judgment of the Court (Fifth Chamber) of 14 November 2002

Gemeente Steenbergen v Luc Baten

Case C-271/00

European Court reports 2002 Page I-10489

German Graphics v. van der Schee

Judgment of the Court (First Chamber) of 10 September 2009

German Graphics Graphische Maschinen GmbH v Alice van der Schee.

Case C-292/08

European Court reports 2009 Page I-08421

Gourdain v. Nadler

Judgment of the Court of 22 February 1979.

Henri Gourdain v Franz Nadler.

Case 133/78.

European Court reports 1979 Page 00733

Group Josi

Judgment of the Court (Sixth Chamber) of 13 July 2000

Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)

Case C-412/98

European Court reports 2000 Page I-05925

Grunkin Paul

Judgment of the Court (Grand Chamber) of 14 October 2008

Stefan Grunkin and Dorothee Regina Paul

Case C-353/06

European Court reports 2008 Page I-07639

Grzelczyk

Judgment of the Court of 20 September 2001.

Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve

Case C-184/99

European Court reports 2001 Page I-06193

Eurofood

Judgment of the Court (Grand Chamber) of 2 May 2006.

Eurofood IFSC Ltd.

Case C-341/04.

European Court reports 2006 Page I-03813

Ibrahim

Judgment of the Court (Grand Chamber) of 23 February 2010

London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department

Case C-310/08

European Court reports 2010 Page I-01065

Ingmar

Judgment of the Court (Fifth Chamber) of 9 November 2000.

Ingmar GB Ltd v Eaton Leonard Technologies Inc.

Case C-381/98

European Court reports 2000 Page I-09305

Inspire Art

Judgment of the Court of 30 September 2003

Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd.

Case C-167/01

European Court reports 2003 Page I-10155

Interedil

Judgment of the Court (First Chamber) of 20 October 2011

Interedil Srl, in liquidation v Fallimento Interedil Srl, Intesa Gestione Crediti SpA

Case C-396/09

European Court Reports 2011, Page 00000

Kerstin Sunderlind Lopez

Judgment of the Court (Third Chamber) of 29 November 2007

Kerstin Sundelind Lopez v Miguel Enrique Lopez Lizazo

Case C-68/07

European Court reports 2007 Page I-10403

LTU v. Eurocontrol

Judgment of the Court of 14 October 1976. - LTU Lufttransportunternehmen GmbH & Co. KG v Eurocontrol

Case 29-76

European Court reports 1976 Page 01541

Marc Rich and Co. AG v. Societa italiana Impianti PA

Judgment of the Court of 25 July 1991

Marc Rich & Co. AG v Società Italiana Impianti PA

Case C-190/89

European Court reports 1991 Page I-03855

Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Development

Judgment of the Court (Grand Chamber) of 23 February 2010.

Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department

Case C-480/08

European Court reports 2010 Page I-01107

Martínez Sala

Judgment of the Court of 12 May 1998
María Martínez Sala v Freistaat Bayern
Case C-85/96
European Court reports 1998 Page I-02691

McCarthy

Judgment of the Court (Third Chamber) of 5 May 2011
Shirley McCarthy v Secretary of State for the Home Department
Case C-434/09
European Court reports 2011 Page 00000

Micheletti

Judgment of the Court of 7 July 1992.
Mario Vicente Micheletti and others v Delegación del Gobierno en Cantabria.
Case C-369/90.
European Court reports 1992 Page I-04239

National Grid

Judgment of the Court (Grand Chamber) of 29 November 2011.
National Grid Indus BV v Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam
Case C-371/10.
European Court reports 2011 Page 00000

N. S.

Judgment of the Court (Grand Chamber) of 21 December 2011.
N. S. (C-411/10) v Secretary of State for the Home Department et M. E. and Others (C-493/10) v
Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform.
Joined cases C-411/10 and C-493/10
European Court reports 2011 Page 00000

Rottmann

Judgment of the Court (Grand Chamber) of 2 March 2010
Janko Rottman v Freistaat Bayern
Case C-135/08
European Court reports 2010 Page I-01449

Runevič-Vardyn

Judgment of the Court (Second Chamber) of 12 May 2011.
Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and
Others
Case C-391/09.

European Court reports 2011 Page 00000

Ruiz Zambrano

Judgment of the Court (Grand Chamber) of 8 March 2011
Gerardo Ruiz Zambrano v Office national de l'emploi (ONEm)
Case C-34/09
European Court reports 2011 Page 00000

Sayn-Wittgenstein

Judgment of the Court (Second Chamber) of 22 December 2010.
Ilonka Sayn-Wittgenstein v Landeshauptmann von Wie
Case C-208/09
European Court reports 2010 Page I-13693

Sevic

Judgment of the Court (Grand Chamber) of 13 December 2005.
SEVIC Systems AG.
Case C-411/03.
European Court reports 2005 Page I-10805

Sonntag v. Waidmann

Judgment of the Court of 21 April 1993.
Volker Sonntag v Hans Waidmann, Elisabeth Waidmann and Stefan Waidmann
Case C-172/91
European Court reports 1993 Page I-01963

TIARD

Judgment of the Court (Fifth Chamber) of 15 May 2003
Préservatrice foncière TIARD SA v Staat der Nederlanden
Case C-266/01
European Court reports 2003 Page I-04867

TNT Express Nederland BV v. AXA Versicherung AG

Judgment of the Court (Grand Chamber) of 4 May 2010
TNT Express Nederland BV v AXA Versicherung AG
Case C-533/08
European Court reports 2010 Page I-04107

Trojani

Judgment of the Court (Grand Chamber) of 7 September 2004
Michel Trojani v Centre public d'aide sociale de Bruxelles (CPAS)

Case C-456/02

European Court reports 2004 Page I-07573

Überseering

Judgment of the Court of 5 November 2002

Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)

Case C-208/00

European Court reports 2002 Page I-09919

Van Uden v. Deco-Line

Judgment of the Court of 17 November 1998.

Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another

Case C-391/95

European Court reports 1998 Page I-07091

National legislation

BELGIUM

Code of Private International Law 2004

GERMANY

Introductory Act to the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB) of 1896, as amended

Article 1365 Civil Code

NETHERLANDS

Articles 88 and 89 Book 1 Civil Code

Book 10 of the Civil Code.

POLAND

Act of February 4, 2011 on Private International law

The PIL Act of 12 November 1965.

Act of 17 November 1964 – the Code of Civil Procedure

PORTUGAL

Article 1682-A Civil Code

Case law. National courts.

AUSTRIA

Austrian Supreme Court of 17 March 2005 - 8 Ob 131/04d

Austrian Supreme Court 24 January 2006 10 Ob 80/05w

Austrian Supreme Court 23 February 2006, 9 Ob 135/04z.

BELGIUM

Court of Appeal of Brussels of 22 June 2009, *Revue de l'arbitrage* 2009, 574, note A. Mourre

FRANCE

SNF v. Cytec, Paris Court of Appeal of 13 March 2006 and the French Supreme Court of 4 June 2008, *Clunet* 2008, 1107, note A. Mourre

UNITED KINGDOM

Court of Appeal (Civil Division) Judgment of 9 July 2009, *Syska v. Vivendi Universal SA et al* [2009] 28 EG 84, [2009] EWCA Civ 677

High Court of Justice, Queen's Bench Division, Commercial Court), Judgment of 2 October 2008, *Syska v. Vivendi Universal SA et al* [2008] EWHC 2155 (Comm)

Court of Appeal (Civil Division) Judgment of 9 July 2009, *Syska v. Vivendi Universal SA et al* [2008] EWHC 2155 (Comm)

Mazur Media Ltd & Anor v Mazur Media GmbH & Ors, Court of Appeal - Chancery Division, judgment of 7 July 2004, [2004] EWHC 1566 (Ch)

Literature

Ankersmit/Geursen: "Ruiz Zambrano: de interne situatie voorbij", *Asiel & Migrantenrecht* 2011, p. 157-164

Baarsma: *The Europeanisation of international family law: from Dutch to European law: an analysis on the basis of the choice of law on divorce and on the termination of registered partnerships*, 2010

Bariatti: *Cases and materials on EU private international law*, 2011

Barnard: *The Substantive Law of the EU-The Four Freedoms*, 2010

Beaumont & McEleavy: *Anton's Private international law*, 3rd edition, 2011

Bergmann/Ferid: *Internationales Ehe-und Kindschaftsrecht: Dänemark*

Boele-Woelki/Van Iterson: *The Dutch private International law Codification: Principles, Objectives and Opportunities*, *Electronic Journal of Comparative Law*, Vol 14.3.

Bordignon/Brusco: *On Enhanced Cooperation*, *Journal of Public Economics* 90 (2006) 2085

Carsten: *Europäisches Integration und Zusammenarbeit auf dem Gebiet des Zivilrechts*, *ZEUP* 1993, p. 335-353

Dicey, Morris & Collins: *The conflict of laws*, 14th Edition, 2006

Eijken, H. van: *Case C-391/09, Malgožata Runevic-Vardyn and Łukasz Paweł Wardyn v. Vilniaus miesto savivaldybės administracija and Others*, Judgment of the Court (Second Chamber) of 12 May 2011, nyr.- *Common Market Law Review* 2012, pp. 810-826 Fawcett & Carruthers: *Private international law*, 14th Edition, 2008

Erauw: *Historiek van de opmaak van het wetsvoorstel houdende het Wetboek van Internationaal Privaatrecht* (at www.ipr.be)

Erauw: Het voorstel van Belgisch wetboek van internationaal privaatrecht en zijn algemene bepalingen, WPNR 6537 (2003), p.481-490

Erauw: De komende codificatie van het Belgisch Internationaal Privaatrecht (at www.ipr.be)

Fallon/Lagarde (eds.): Quelle architecture pour un code européen de droit international privé? 2011

Goode, Commercial Law, 3rd Edition, 2004

International Herald Tribune of 28 April 2012: Brain Drain Feared as German Jobs Lure Southern Europeans

International Herald Tribune of 25 July 2012: On Gay Marriage, Europe Strains to Square 27 Interests

Iterson, D. van: The Response of National Law to International Conventions and Community Instruments – the Dutch Example, European Journal of Law Reform 2012 (14). p. 3-16

Kieninger: Das Europäische IPR vor der Kodifikation? In: Festschrift Von Hoffmann, Grenzen überwinden – Prinzipien bewahren, 2012, p. 184-197

Mei/Van den Bogaert/De Groot: De arresten Ruiz Zambrano en McCarthy, NtER 2011, p. 188-199

Pazdan: Das neue polnische Gesetz über das internationale Privatrecht, IPRax 2012, p. 77-81

Pertegas: The Belgian Code on Private International Law: a tour d’ horizon, IPRax 2006, pp. 53-61

Piris: The Future of Europe, 2011

Saarloos: European private international law on legal parentage?, 2010)

Savino: EU-citizenship: post-national or post-nationalist? Revisiting the Rottmann case through Administrative Lenses”, ERPL/REDP, vol.23, p.8

Voermans/Moll/Florijn, Van Lochem: Codification and consolidation in Europe as means to untie red tape, Statute Law Rev (2008) 29 (2): 65-81

Zekoll/Reimann: Introduction to German Law, 2005

EU commissioned studies

Study on the question of effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person’- May 2012

(see http://ec.europa.eu/justice/civil/files/report_assignment_en.pdf)

Centre for Strategy & Evaluation Services: Data Collection and Impact Analysis – Certain Aspects of a Possible Revision of Council Regulation No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (‘Brussels I’) - 17 December 2010

Conferences

Conference "Brauchen wir eine Rom 0-Verordnung? Überlegungen zu einem Allgemeinen Teil des europäischen IPR" (Do we need a Rome 0 Regulation? Considerations on a general part of European private international law), 29th and 30th June 2012, Bayreuth, organised by Leible and Unberath

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Constitutional Affairs
- Justice, Freedom and Security
- Gender Equality
- Legal and Parliamentary Affairs
- Petitions

Documents

Visit the European Parliament website: <http://www.europarl.europa.eu>

PHOTO CREDIT: iStockInternational Inc.



ISBN