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Founding Editor
Petar Šarčević †

Editors
Andrea Bonomi and Paul Volken

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PRIVATE INTERNATIONAL LAW

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FOREWORD

The current volume of the *Yearbook* attempts to strike a balance in the multifaceted expressions of the increasing importance of private international law at national and supranational levels.

The vitality of private international law within the European Union is evidenced by both legislative projects and the rich case law of the European Court of Justice. Among the former, one should first mention the recent Commission draft for a Regulation on succession, which probably constitutes the most detailed and ambitious attempt ever to codify private international law in this area. The draft not only covers conflict of laws and conflict of jurisdictions with respect to succession, but also ventures on the very delicate ground of the administration of estates, including, among others, the project of a European Succession Certificate. While this draft begins its legislative process, a new initiative on the application of foreign law is being considered by the European institutions. Both of these developments are discussed in the Doctrine section. In the section on court decisions, we report on some interesting judgments of the ECJ interpreting existing regulations (such as Brussels I and the insolvency regulation).

While the European institutions' efforts towards the creation of a European private international law system steadily continue, interesting developments are also taking place on other continents. For example, the present volume includes a special section focusing on Chinese private international law. A codification of conflict of law rules will probably be adopted in China in the next few years, but the existing case law, as well as the interpretation rules issued in certain areas by the Supreme People's Court, deserve increased, contemporary attention from foreign scholars. The *Yearbook* also reports on the renewed interest with conflict of laws in the U.S. doctrine and a new draft codification in Uruguay. National reports from Japan, Panama and the Nordic countries should also be mentioned.

Among the highlights of this volume, we will also mention some important theoretical contributions on the new role of party autonomy and on the controversial relationship between private international law and comparative law.

Finally, the Forum section includes very interesting essays on two classical and continuously disputed topics, *lis alibi pendens* and the private international law aspects of money, and on the relatively new and challenging question of the relationship between intellectual property and state immunity.

Andrea Bonomi,
Paul Volken

ABBREVIATIONS

Am. J. Comp. L.	American Journal of Comparative Law
Am. J. Int. L.	American Journal of International Law
Clunet	Journal de droit international
ECR	European Court Reports
I.C.L.Q.	International and Comparative Law Quarterly
I.L.M.	International Legal Materials
id.	idem
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
OJ	Official Journal
PIL	Private International Law
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Recueil des Cours	Recueil des Cours de l'Académie de la Haye de droit international = Collected Courses of The Hague Academy of International Law
Rev. crit. dr. int. pr.	Revue critique de droit international privé
REDI	Revista española de derecho internacional
Riv. dir. int. priv. proc.	Rivista di diritto internazionale privato e processuale
Riv. dir. int.	Rivista di diritto internazionale
RIW	Recht internationaler Wirtschaft
RSDIE	Revue suisse de droit international et européen = Schweizerische Zeitschrift für internationales und europäisches Recht

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DOCTRINE

PARTY AUTONOMY IN INTERNATIONAL FAMILY AND SUCCESSION LAW: NEW TENDENCIES

Erik JAYME*

I. Introduction

In the field of international contractual and extracontractual obligations, party autonomy is recognized today as one of the fundamental principles of conflict of laws, as demonstrated in the Rome I and Rome II Regulations of the European Union.[1] Choosing the applicable law is a mode of exercising and utilising freedom as an integral part of human rights and enables the parties to design their economic

* Prof. Dr. Dr.h.c. mult., Heidelberg. This paper reproduces, with few amendments, the text of the speech held by the author at a Symposium convened in Lausanne on 19 March 2009 to celebrate the 10th Anniversary of the *Yearbook of Private International Law*. The author thanks Dr. Carl Friedrich Nordmeier and Dr. Matthias Weller for much help while preparing this text for publication. See also JAYME E. and NORDMEIER C.F., 'Zwanzig Jahre schweizerisches IPR-Gesetz – Globale Vergleichung im Internationalen Privatrecht', in: *IPRax* 2009, pp. 372 s.

[1] See CORDERO MOSS G., 'Den nye europeiske internasjonale formueretten og norsk internasjonal formuerett', in: *LoR (Lov og Rett) Norsk Juridisk Tidsskrift* 2009, pp. 67 ss., 74 s.; for restrictions of party autonomy see BALLARINO T., 'Dalla Convenzione di Roma del 1980 al Regolamento Roma I', in: *Riv. dir. int.* 2009, pp. 40 s., pp. 48 s.

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activities and fine-tune their interests more effectively than any legislator could do.[2] Closely linked to the freedom to choose the applicable law is the freedom to choose the appropriate forum.[3] In the context of International Family and Sucession Law, however, party autonomy has always encountered a certain degree of reluctance. This is due to the deeply rooted idea that family and succession law should not be susceptible to agreements by individuals, due to the institutional character of family relations that are protected by the State Constitutions. In particular, family law does and indeed must focus on the 'weaker parties' such as children, a fact that requires a specific protection against unfavourable agreements by individuals. Even in property and purely monetary issues such as the matrimonial regime or the administration of estates of a deceased person, legislatures and courts have allowed parties to choose the applicable law only to a very limited extent. One expression of these restrictions of freedom is the immutability doctrine, which limits the law applicable to the effects of marriage on the property of the spouses to the time of the celebration of the marriage. This doctrine still pervades the conflicts rules that govern the matrimonial regime, at least as a starting point.[4] It reflects the historical idea that spousal contracts should be confined to the time of or before the marriage – therefore known as 'antenuptial agreements'.[5]

However, when it comes to party autonomy, the idea of a stark difference between the law of obligations on the one hand, and of family and succession law on the other, is beginning to change. Now more than ever, there are several reasons that justify the introduction of party autonomy as a principle in conflicts of law even for family and succession law. The first such reason corresponds to a respective development in substantial law. The immutability doctrine is losing its characterization as a dogma.[6] In an increasing number of States, including all formerly Socialist states, the matrimonial regime changes when the spouses move from one country to another, and this is taken into account even in States that follow the immutability doctrine by way of *renvoi*. In other countries, the spouses may choose the applicable law in order to adjust their property issues to the law of the new domicile. In succession law, the freedom of the testator to make a will according to his personal wishes is a value of increasing importance, whereas the dominance of rules protecting the family of the deceased is decreasing. This development is also

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[2] See JAYME E., 'L'autonomie de la volonté des parties dans les contrats internationaux entre personnes privées', in: *Annuaire de l'Institut de Droit International – Session de Bâle* – Vol. 64-I, 1991, pp. 7 ss; LEIBLE, S., 'Parteiautonomie im IPR – Allgemeines Anknüpfungsprinzip oder Verlegenheitslösung?', in: *Festschrift E. Jayme,* vol. II, München 2004, pp. 485 s.

[3] See BRIGGS A., *Agreements on Jurisdiction and Choice of Law*, Oxford 2008.

[4] See e.g. art. 15 (1) of the German Introductory Law to the Civil Code.

[5] See, for example, art. 1698 – 1716 of the Portuguese Civil Code ('convenções antenupciais'), art. 1.653 – 1.657 of the Brazilian Civil Code ('pacto antenupcial').

[6] See art. 1.639 § 2 of the Brazilian Civil Code (Law 10.4.06 of Jan.10, 2002) which allows the change of the matrimonial regime after the celebration of marriage. This change has to be authorized by a judge.

paving the way to affording the testator autonomy to choose the applicable law in international cases.

Another reason for allowing party autonomy is evident in the need to achieve compromises within the European Union.[7] One means of reconciling the principle of nationality and the principle of habitual residence is to allow party autonomy. If introducing the habitual residence of the deceased at the time of his death as the general connecting factor for succession, nevertheless allowing the possibility for the testator to choose his or her national law can be appreciated as a balanced tribute to the competing connecting factor of nationality. In family law the European Union has to reconcile the clash between the common law countries, where the courts never apply foreign law, and the continental systems, based on connecting factors such as nationality of the spouses, that inevitably result in the application of foreign law. Party autonomy, which allows the choice of the law of the forum, might help to find solutions that are compatible with both systems. To put it differently: in Europe, introducing party autonomy in international family law is motivated by the needs of integration in the European Union, rather than by ideas of self-determination of the person.

In this lecture I will first concentrate on recent tendencies with regard to party autonomy as derived from examples in legislation and court practice. I will then analyse some of the specific problems raised by agreements on jurisdiction and choice of law, especially regarding their formal validity, and the question of the law applicable to such agreements. Many of the problems known from choice of law for obligations recur in the field of family and succession law, above all the prerequisites for a 'tacit' choice of the applicable law based on the circumstances of the agreement.[8]

Finally, I will raise the question of what the role of party autonomy may be in the field of mediation. This question is worthy of consideration since mediation as an alternative dispute resolution mechanism is increasingly used across all areas of law[9] and will certainly not stop short of family law disputes.

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[7] See, for the law applicable to the matrimonial regime of the spouses: WAGNER R., 'Konturen eines Gemeinschaftsinstruments zum internationalen Güterrecht unter besonderer Berücksichtigung des Grünbuchs der Europäischen Kommission', in: *FamRZ* 2009, pp. 268 ss., 279.

[8] BGH, 30.10.2008, I ZR 12/06: 'Für eine die ursprünglich geltende Rechtordnung abändernde Rechtswahl bedarf es... eines dahingehenden beiderseitigen Gestaltungswillens'.

[9] See for a discussion of different solutions for the determination of the law applicable to mediation agreements, HUTNER A., *Das internationale Privat- und Verfahrensrecht der Wirtschaftsmediation*, Tübingen 2005, pp. 30 ss.; for family matters see Ley 1/2009, de 27 de febrero, reguladora de la Mediación Familiar en la Comunidad Autónoma de Andalucía, *Boletin Oficial del Estado*, April 2, 2009, p. 31274.

II. New Tendencies

A. Maintenance Obligations

Let me start by drawing your attention to the recent Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.[10] Article 4 of this Regulation concerns the choice of court by the parties and provides for detailed rules. Under the Brussels I Regulation which addresses maintenance obligations in its art. 5 no. 2, the general rules on choice of court agreements apply, but choice of court agreements – to my knowledge – did not ever play a significant role in maintenance disputes. The detailed rules of the 2009 Regulation imply that the parties may agree upon the jurisdiction of the court to settle their maintenance dispute. The choice is restricted to the court or courts of a Member State in which one of the parties is habitually resident, or of a Member State whose nationality is held by one of the parties. Special rules apply to obligations between spouses or former spouses. There is no such choice of court for disputes relating to a maintenance claim in respect of a child under the age of 18. No such restriction can be found in the Brussels I Regulation.

While agreements on jurisdiction are not completely new in that field, the choice of the applicable law as to maintenance obligations is a novelty. In article 15, the Regulation refers to the Hague Protocol on the Law Applicable to Maintenance Obligations of 23 November 2007, which has not yet entered into force. The Protocol introduces party autonomy for maintenance obligations in articles 7 and 8. According to article 7 'the maintenance creditor and debtor for the purpose of a particular proceeding in a given State may expressly designate the law of that State as applicable to a maintenance obligation.' This provision favours the applicability of the law of the forum, probably for reasons mentioned earlier. In addition, 'the maintenance creditor and debtor may at any time designate one of the following laws as applicable to a maintenance obligation –

a) the law of any State of which either party is a national at the time of the designation;

b) the law of the State of the habitual residence of either party at the time of designation;

c) the law designated by the parties as applicable, or the law in fact applied, to their property regime;

d) the law designated by the parties as applicable, or in fact applied, to their divorce or legal separation.'

These restrictions in the choice of the applicable law are different to the Regulation's regime for choice of court agreements. According to article 8 (3) of

[10] See BEAUMONT P., 'International Family Law in Europe – the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity', in: *RabelsZ* 2009, pp. 509 ss.; KOHLER Ch. and PINTENS W., 'Entwicklungen im europäischen Familien- und Erbrecht 2008-2009', in: *FamRZ* 2009, pp. 1529 s.

the Hague Protocol paragraph 1 'shall not apply to maintenance obligations in respect of a person under the age of 18 years or of an adult who, by reason of an impairment or insufficiency of his or her personal faculties, is not in the position to protect his or her interest.' In Germany, the Constitutional Court introduced a so-called 'social control' of all spousal agreements on maintenance in order to protect the 'weaker' spouse, particularly in the case of a pregnant wife. In other countries there is no such control, provided that each of the spouses has been assisted by their respective counsels when negotiating the agreement.[11] In my view, the Protocol must be interpreted autonomously and this excludes any reference to national law.[12] However, the broad and vague language of the Hague Protocol reduces the importance of party autonomy for maintenance obligations, given that the validity of each agreement may be questioned in a dispute.

Let me now turn to new tendencies in court practice.

B. Court Practice

1. Agreements Made in View of a Foreign Law Not Applicable

A recurrent problem in international cases concerns agreements entered into with respect to a foreign law that, according to the conflicts rules of the forum, is not applicable. German commentators like to speak of 'acting under the wrong law' (*Handeln unter falschem Recht*).

Let us look at a recent case that will probably be settled outside the courts. The spouses, a Norwegian husband and a German wife, celebrated their marriage in Germany, where they had lived for some time prior to their marriage. After two years they moved to Norway, where they entered into a formal agreement in order to separate their assets under their matrimonial regime. The reason was that the husband had incurred so many debts that the wife wanted to protect her property against the creditors of her husband. After some time the spouses moved back to Germany, they subsequently separated and the husband brought a divorce action including a claim for compensation under the German legal matrimonial regime (*Zugewinnausgleich*). The wife relied on the Norwegian agreement. In such cases German conflicts rules 'freeze' the law applicable to the matrimonial regime at the moment of the celebration of marriage. Since the spouses held different

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[11] See LUHN Ch., *Privatautonomie und Inhaltskontrolle von Eheverträgen. Ein kritischer Vergleich des deutschen und des australischen Rechts mit Bezügen zum Internationalen Privatrecht*, Frankfurt am Main 2008.

[12] But cf. the decision of the Court of Appeal of British Columbia in *Friedl v. Friedl* 2009 BCCA 314 (2009) (pre-nuptial agreement of German spouses before a German notary in Germany containing a choice-of-law clause; the Court applying German law of 'social control' invalidated the agreement including the choice of the applicable law, and divided the parties' assets according to British Columbia law. In my view the court should have applied the German law regarding the legal matrimonial regime in absence of a spousal agreement, because the choice-of-law clause has to be considered separately).

nationalities, the law of the common habitual residence of that moment in time was applicable, in this case German law. Under German substantive law (art. 1409 of the German Civil Code) a spousal agreement is invalid if it refers to a foreign matrimonial regime. The question arose whether the spouses when and by making the agreement in Norway chose Norwegian law as the applicable law, which is possible under German private international law provided that the parties have complied with the local formalities for spousal agreements.[13] The answer to this intricate question depends on whether the spouses had in mind to change the applicable law or, to put it differently, were aware of the implied effects of the agreement on the applicable law (*kollisionsrechtliches Erklärungsbewußtsein*). Arguably, their intention to have their assets separated would be sufficient grounds under both laws to assume a change of their matrimonial regime from the German compensation scheme into a separation of their assets under whatever other law, however on a closer look the regimes of separation of property in the respective systems of law differ in many substantial respects. Under German law, for example, the effects of a total separation of assets are mitigated, depending upon the particularities of the case at hand, in that the courts assume 'donations' (*Zuwendung*) in order to grant compensation, at least to some extent, in the case of divorce.[14] In some systems, such as the French Civil Code, the regime of separation has been codified in several articles.[15] The seemingly simple case of the Norwegian agreement becomes almost unanswerable under this system, illustrating that one of the main problems of party autonomy concerns the fact that parties do not think in terms of conflict of laws if they are not assisted by lawyers specialized in private international law. When negotiating contracts in many areas of law, parties are generally used to addressing the issues of the applicable law and choice of the forum for their disputes; however, when it comes to agreements in family or succession law, the typical parties have not yet reached a comparable degree of awareness.

2. *Freedom of the Testator*

May I pass to another case which concerns testamentary succession which has been the object of a decision of the Court of Appeal (*Kammergericht*) Berlin (20 February 2008).[16] An Egyptian national of Muslim faith made a will, according to which he instituted his daughter as heir. His wife, mother of the child, had already died. He excluded his son from a relation with another woman and whom he had

[13] Article 15 (3) with Article 14 (4) EGBGB.

[14] Palandt-Brudermüller, BGB, 68th ed., 2009, Gütertrennung, Grundzüge no. 2, p. 1709 (introduction to art. 1414 BGB): 'Ein Vermögensausgleich nach Beendigung des Güterstands findet nicht statt. Allerdings führen die zur Rückgewähr unbenannter Zuwendungen entwickelten Grundsätze (....) zu einem verkappten güterrechtlichen Ausgleich.' See also JAYME E., 'Zur Auslegung des § 1931 IV BGB bei ausländischem Ehegüterrechtsstatut', in: *Festschrift M. Ferid*, München 1978, pp. 221 ss., 231 s.

[15] Art. 1536 – 1543 Code Civil ('Du régime de séparation de biens').

[16] ZEV 2008, 440.

recognized according to the formalities prescribed by German law. The son, who was not of Muslim belief, contested the validity of the will in the daughter's motion for a certificate of inheritance. As an argument, he relied, inter alia, on German public policy. The lower courts decided in favor of the son, who would inherit one third of the assets, while the daughter would receive two thirds. The *Kammergericht* reversed the decision, applying Egyptian law as the national law of the testator, a law that grants almost no freedom of the testator and excluded the son as an heir because he was not a Muslim. German public policy was not deemed violated by such Islamic laws because, under German substantive succession law, the result would have been the same: the testator is free to prefer one of his children and to exclude the others who will then have merely some rights under the rules of forced heirship. Consequently, the Court of Appeal held that the daughter remained the only heir under Egyptian and under German law.

This case is most interesting for several reasons. Under German conflicts law, a testator may choose German law in respect to succession of immovables situated in Germany.[17] Thus, a will invalid under the national law of the testator may be upheld under German law at least for immovables. The main problem – like in the Norwegian case – concerns the question of whether the testator intended to change the otherwise applicable law. In court practice the reference to rules or institutions of German succession law is usually sufficient for assuming a tacit choice. Such a result can well be justified by the overriding principle of a 'favor testamenti' in the sense of a 'rule of validation', according to Ehrenzweig's phraseology.

In the case of the Egyptian testator the national law did not grant any freedom of choice to the testator, however in its legal result the will coincided with the rules on legal heirs of Egyptian law that excluded the son for two reasons: firstly for not being a Muslim, and secondly for being an illegitimate child of the testator. Since under German domestic law a testator may exclude his son in favor of the daughter for whatever reasons, Egyptian law, according to the court, did not violate German public policy. In a similar way, the court in fact applied a rule of validation, taking into account the freedom of the testator under German law.

III. Choice of Law Agreements – Applicable Law

We know from the conflicts law of obligations how difficult it is to determine the applicable law in ascertaining the validity – formal and substantive – of the agreement about the applicable law.[18] On this issue, there are two methods.[19] Either an

[17] Article 25 (2) EGBGB.

[18] See JAYME E., 'Choice-of-Law Clauses in International Contracts: Some Thoughts on the Reform of Art. 3 of the Rome Convention', in: LIMA PINHEIRO L. (org.), *Seminário internacional sobre Comunitarização do Direito Internacional Privado*, Coimbra 2005, pp. 51 s.

international instrument directly prescribes certain prerequisites for the choice of law agreements, or it refers to national laws by a special conflicts rule. The Rome I Regulation applies both methods; the Rome II Regulation only the former.

For maintenance obligations the Hague Protocol prescribes in article 8 paragraph 2:

> 'Such agreement shall be in writing or recorded in any medium, in which the information contained is accessible so as usable for subsequent reference, and shall be signed by both parties.'

At first sight one could think that a tacit choice is not sufficient, however the article is not clear in this respect. For example, in the Norwegian case both parties had signed the agreement, from which it could be inferred that the parties intended to apply Norwegian law. The question remains whether the choice must be express or not. In addition, the provision does not give any guidance for determining the law applicable to the substantive validity of the agreement mentioned in article 3 paragraph 5 of the Rome I Regulation.

Sometimes the language used in the document indicates the parties' choice of law for the issue in question. However, in the Egyptian case the testator had made two wills, one written in Arabic, the other in German.

To sum up: we can only observe the complete lack of coherence between the different regulations.

IV. Mediation – Divorce by Private Act

Finally, let me turn to the question of whether party autonomy may lead to the exclusion of conflicts law at all, in that the parties agree upon mediation or similar alternative dispute resolutions. In this context religious authorities may also be mentioned.[20]

Family law disputes are usually preceded by reconciliation proceedings where special authorities seek to convince the spouses to uphold their marriage. In these proceedings the interests of any children play an important role. In international cases, at least in German court practice, many decisions deal with the problem of whether a family court has to take into account foreign procedural law concerning the reconciliation of the spouses.[21] In general, the answer is a substitution of the foreign authority by the court of the forum, that is allowed to apply its

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[19] See STANKEWITSCH P., *Entscheidungsnormen im IPR als Wirksamkeitsvoraussetzungen der Rechtswahl*, Frankfurt am Main 2003.

[20] See JAYME E. and NORDMEIER C.F., 'Griechische Muslime in Thrazien: Internationales Familien- und Erbrecht im europäischer Perspektive', in: *IPRax* 2008, pp. 369 s.

[21] OLG Bremen, 14.1.1983, *IPRax*, 1984, p. 1985, note JAYME E.