Yearbook of Private International Law

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Founding Editors
Petar Šarčević † and Paul Volken

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Andrea Bonomi and Gian Paolo Romano

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FOREWORD

As well as asking some distinguished American authors – who generously responded to our invitation – to present a topic or theme at the heart of today's debate in the U.S., we deemed it useful to offer some thoughts by European scholars on the proposed reform of the keystone of the European private international law, Brussels I, on which much attention is focused in the Old Continent. This has resulted in a parallel report on some aspects, or effects, of what have come to be known as the "American" and "European" conflict revolutions. If this is arguably the highlight of the present volume of our *Yearbook*, some of the latest developments and key accomplishments in the Afro-Asian sphere are also covered in it.

At a time when the American conflict revolution is reported to enter a more mature phase, conflicts rule tend to re-emerge in the shape of "quasi-rules" in order to foster legal certainty. The Oregon 2009 codification in the tort field, which supplements the contracts statute enacted almost a decade earlier, stands out as a rather unique experience in the American landscape while providing a model of how predictability and flexibility can harmonise. The U.S. Supreme Court landmark decision of July 2010 in *Morrison* confirms – alongside the *Vivendi* case in Europe, which is reported in the Court Decisions – the increasing importance of transnational class actions today. The lively debate that *Morrison* sparked on the appropriate reach of U.S. statutes at large is somewhat mirrored by the attention that is being devoted to the Community *lois de police,* as revealed by a paper included in the Doctrine section. A report on the current state of recognition and enforcement shows – surprisingly to some – that U.S. courts give largely favourable reception to foreign judgments on the basis of the *Hilton v. Guyot* doctrine as well as of two federal acts of 1962 and 2005. What may be termed as the "defamation exception", provided for by a federal "Speech Act" of mid-2010 which lays down restrictive rules on recognition in this field, notoriously poses acute challenges to the European law-making agencies as well. Finally, two papers report on the U.S. attitude towards two important international instruments done at the Hague: the first offers a detailed and lively account of how the Convention on Child Abduction is interpreted by U.S. Courts, while the second presents a critical discussion of the difficulties hampering the implementation process of the 2005 Choice of Court Convention as well as some ideas on how best to overcome them.

Choice of court agreements also lie at the heart of the Brussels I proposed reform, which is likely to have a significant, long-term economic and political impact in Europe and beyond. Even if much is probably to be done before a revised Regulation sees the light, the way ahead seems to be paved by the Commission proposal of December 2010. A general, yet detailed, survey of all main issues raised by the proposal is followed by a thorough discussion of the possible ways to improve the law on jurisdiction agreements as well as of the possibility to recover damages resulting from breach of such agreements (which subject has also been

covered in the previous editions). An analysis of the real significance of the proposed abolition of the exequatur against the backdrop of mutual trust and a study of the impact of the Brussels I regime to "external" situations – a matter for concern within the European Group for Private International Law – are also included in this section, which draws heavily on the seminar organised in late 2010 by the Council of Notaries of Catalonia together with the University Rey Juan Carlos of Madrid.

The traditional Doctrine chapter offers a critical assessment of Regulation "Rome III" on the law applicable to divorce and separation – another, though controversial, innovation in the EU regulatory landscape –, some thoughts on the balance to be achieved between freedom of choice and overriding mandatory rules in the contractual field as well as a discussion of the momentous and seemingly intractable issue, which is being hotly debated worldwide, of how foreign judgments on arbitral awards shall be given effect in the forum state.

As already mentioned, the National Reports' focus is outside the EU as well as outside geographical Europe, except for a Norwegian report, which shows that Norway takes considerable and respectful account of the EU legislation, and a Swiss report, which discusses the implementation of the revised Lugano Convention in Switzerland, process which has been further complicated by the simultaneous entry into force of the Swiss Code of Civil Procedure, a tremendous event in the legislative history of this country. We are then proud to present our readers with the first fully fledged article in English on private international law in Iran, a substantial contribution on recognition of foreign divorce decrees in Israel, an essay on law applicable to technology transfer contracts from an Egyptian perspective, an overview of the brand-new Chinese Private International Law Act, which entered into force in April 2011, as well as a report on the innovative agreement recently entered by New South Wales and Singapore to facilitate mutual ascertainment of foreign law, a much neglected and yet crucial subject to which we propose to dedicate a full section in the next volume.

The Court Decisions bring the reader back to Europe. This year's section includes notes on six ECJ rulings, three of which made in the field of *forum contractus* and thereby contributing to the neverending debate on Art. 5 to which the proposed reform promises no change (*Rehder*, *Car Trim* and *Wood Floor*), two on the "directing activities" notion – critical to determine jurisdiction for consumer contracts made through the web – (*Pammer* and *Hotel Alpenhof*), and the last one concerning the tricky interplay between Brussels I and the Insolvency Regulation regarding reservation of title (*German Graphics*). A Spanish decision on recognition of parentage created by surrogate motherhood confirms that issues raised by assistive reproductive technology are rapidly coming at the forefront of the conflict debate. A report on the work in progress at the Hague Conference for the period 2008-2010 and a comparative look into European and U.S. current trends by a young scholar complete this rich volume.

Andrea Bonomi Gian Paolo Romano

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

TABLE OF CONTENTS

Court Decisions

Forum

Materials

DOCTRINE

FOR BETTER OR FOR WORSE: THE EUROPANIZATION OF INTERNATIONAL DIVORCE LAW

Katharina BOELE-WOELKI*

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I. Prologue

"How to facilitate the life of European families and citizens?" This was the title of the workshop on Civil Justice that took place on 30 November 2010 in the European Parliament. The workshop was attended by European and national parliamentarians. Its aim was to inform them about the Union's efforts to remove the legal and administrative barriers that citizens face when they start a family life in a Member State other than their own. This author was invited to give a briefing about the new legal instruments regulating cross-border divorces, and in front of the European Parliament[1] she argued strongly that the instrument should not be adopted for various reasons, without having any illusions that members of the European Parliament or of the European Council would change their mind or reconsider the decision they were about to take. The legislative engine of this instrument started to warm long ago, beginning in the summer of 2010. Yet it could not be diverted from its course. Therefore it came not as surprise when the Regulation was adopted shortly after the workshop at the European Parliament and implemented enhanced cooperation in the area of the law applicable to divorce and legal separation.[2]

This so-called Rome III Regulation has an interesting history. Although the Regulation may set a precedent in more than one respect, most importantly it sets the tone for future international family law instruments to be adopted by the European legislature. Rome III forms the core of this contribution, which addresses both the progression and the retrogression of international family law in Europe today.

[1] See BOELE-WOELKI K., The Proposal for enhanced cooperation in the area of cross-border divorce (Rome III), European Parliament, Directorate General for Internal Policies, Policies Department C: Citizens' Rights and Constitutional Affairs, <http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1501;jsessionid=2A2CE7BF3B4A38CB98746BACA387F021>.

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

II. The *raison d'être* of Private International Law in Family Matters

A family law relationship with cross-border elements is subject to national law in the absence of a unified body of substantive family law, either in the form of a Convention[3] or a Regulation. If a Swedish-Dutch couple who live in Italy decide to divorce, three different national divorce rules could apply. One possibility would be to treat all three jurisdictions equally and apply the respective divorce rules all together. This would result in the application of the most stringent divorce rules, which in our case would be Italian law. Therefore, this cumulative approach makes no sense.

The "competition" between the different laws is solved in another way. In Europe, the cross-border relationship is pushed toward a single jurisdiction; it is nationalised. Only *one* national law can be applied – the others are disregarded – and conflict of law rules dictate the choice.

If the substantive and procedural rules of all the countries were identical, then private international law problems would *never* exist. This is a utopian thought. However, *if* the EU Member States would agree to transfer their legislative power to the European Commission, it could (then) – theoretically speaking – be possible to unify private and procedural law in the Union. Private international law questions would then arise only in relation to non-Union states. Undeniably, one single European private and procedural codification (replacing the laws of the Member States) is a faraway destination. This goal is not being pursued by either the Community institutions or the Member States.[4] Instead, intense efforts are being expended into the European unification of private international law rules as

[3] An exception is the bilateral Agreement of February 2010 between Germany and France on a common optional matrimonial property regime. It contains uniform substantive rules for German-French couples. The Agreement has not yet entered into force. In contrast, in the field of international transactions, the uniform substantive rules of the Convention on the International Sale of Goods are to be applied if the contracting parties have their place of business in a contracting state. For the background of this Agreement and the incentives, see FÖTSCHL A., "The Common Optional Matrimonial Property Regime of Germany and France – Epoch-Making in the Unification of Law", *Yearbook of Private International Law* 2009, pp. 395-404, also published in *European Review of Private Law* 2010, pp. 881-889.

[4] However, the partial unification of substantive law is on the European agenda. See VON BAR CH., "Europeanisation of Law: Harmonisation or Fragmentation", *Tidskrift utgiven av Juridiska föreningen i Finland* 5/2010, pp. 516-518 (517-518): "(...), but it [the 28th contract regime, KBW] will *not* be an instrument of harmonization." It is expected that the European Council will adopt the so-called "28th regime" in the form of a Regulation containing uniform contract law. See the Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, Brussels, 1.7.2010, COM(2010)348 final.

the "tool of coherence and integration".[5] Before presenting the current status in international family law, another question frequently discussed along with the unification of substantive law should be raised.

For nearly forty years, harmonization of private law has been occurring in Europe. Does this process, which leads to the approximation of the laws of the Member States, have any influence on the need for private international law rules? The answer is not difficult to provide. Through harmonization, the differences between the national laws have or will become less pronounced. But harmonization generally does not result in identical rules. Hence, private international rules are still required, since differences will remain even if the harmonization of private law would – one might wonder when and how – be completed. This means that the harmonization of private and procedural law cannot solve cross-border relationships without the intervention of private international rules. The huge advantage of harmonized law, however, is that disputes about the law to be applied will be less antagonistic, since the outcomes will be similar, if not identical.[6]

A. The Construction of European Private International Law

For over a decade, European Private International Law has been under construction. Some parts of this legislative edifice are completed and in use, some parts are in the midst of construction, and others are still on the drawing board. European Private International Law consists of not only European instruments adopted by the European Council and European Parliament, but also of international conventions. Of the international conventions, those concluded under the auspices of the Hague Conference on Private International Law play the most significant role.[7]

As a result, many different architects are designing the European "house" for private international law. They use various styles and materials, and some use more space than others. Fortunately, there is cooperation between these engineers.[8] The foundation is the European Treaty providing the Union competence to legislate.[9] The roof is being built by the European Court of Justice, which controls the uniform interpretation of European Regulations. This work in process will considerably enlarge the plethora of instruments. As a result, it is increasingly difficult to

[5] JÄNTERÄ-JAREBORG M., "Europeanization of Law: Harmonization or Fragmentation – a Family Law Approach", *Tidskrift utgiven av Juridiska föreningen i Finland* 5/2010, pp. 504-515 (506).

[6] See JÄNTERÄ-JAREBORG M. (note 5), pp. 507-512, who considers the harmonization of substantive law as the alternative.

[7] BOELE-WOELKI K., *European Private International Law*, 2011 (in press).

[8] The 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 and the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations exemplify that cooperation is possible between the European and international lawmakers.

[9] Article 81 Treaty on the Functioning of the European Union (TFEU).

find the applicable private international law rules.[10] In this endeavour, it is essential to consult the correct legal source (Regulation, Convention or national statute/case law) to know exactly what private international law question is posed.[11] This overwhelming but fragmentary work of art resembles the unfinished *Sagrada Família* in Barcelona, with its entangled yet incomplete towers.

B. The Frontrunner: International Family Law

The keyword *família* brings us back to our main theme, international family law, which has received extensive attention from the Union lawmaker. It belongs to the frontrunners. Many cross-border family matters are regulated by European law and the number of Regulations is constantly expanding. Divorce; legal separation; and parental responsibilities, including child abduction and maintenance obligations, are already covered. The property relations of international couples (spouses and registered partners) and inheritance[12] will be added in the near future. Yet the Union has left untouched (and the question is for how long) civil status, marriage, registered partnership, cohabitation, adoption, parentage, the law on surnames and the protection of adults.[13]

Given the sheer number of new European rules and the speed with which they were adopted in the past 10 years, the European legislature cannot be accused of being unproductive. However, Cristina González Beilfuss rightly questions whether the European unification of private international law in family matters is a success, particularly because the new European private international law rules are difficult to apply and the respective Regulations still need to be implemented through legislation in the Member States. Accordingly, Ms. Beilfuss considers that the new system is not yet as beneficial as it was intended to be.[14] It will be demonstrated in the following discussion that the latest European product – Rome III – will not improve the situation.

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[10] BOELE-WOELKI K., *Unifying and harmonizing substantive law and the role of conflict of laws*, Hague pocket series on international law, 2010, no. 4.

[11] DE BOER Th.M., "Samenloop van verdragen en verordeningen op het terrein van het internationaal familierecht", *Tijdschrift voor Familie- en Jeugdrecht* 2010, pp. 308-315.

[12] See Proposal for a Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession COM(2009)154 final.

[13] However, see the Green Paper on less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records, COM(2010) 747.

[14] GONZÁLEZ BEILFUSS C., "The Unification of Private International Law in Europe: a Success Story?", in: BOELE-WOELKI K./ MILES J./ SCHERPE J.M. (eds), *The Future of Family Property in Europe*, 2011 (in press), no. 2.

III. Enhanced Cooperation in International Divorce Law

The Rome III Regulation will not be applied in all Member States. From the 21st June 2012 onwards, only fourteen Member States are bound by the uniform rules that will determine the law applicable to divorce and legal separation. The other thirteen Member States do not participate[15] but may opt-in at any time.[16] Rome III is a frontrunner in its field and is the first time in the area of cooperation in civil matters that the enhanced cooperation procedure has been used. A propos the EU patent will be the second case. For more than eight years the Member States were unable to agree on the language in which the unitary patent is examined and granted. On the other hand, the language was evidently not an obstacle to the unanimous adoption of Rome III. Instead, the content of the rules caused a divide between Member States, which was initiated by Sweden and Finland.

The decision authorizing enhanced cooperation[17] shall be adopted only when the objectives of a Union-wide cooperation cannot be attained within a reasonable period.[18] This last resort requirement was considered fulfilled, since after almost two years of negotiations no unanimity had been reached.

In addition, the following questions must be answered in the affirmative:[19] "Do the conflict of law rules applicable to divorce and legal separation further the objectives of the Union?" and "Do they protect its interests and reinforce its integration process?". At least in respect of the last objective, one has to admit that by definition, enhanced cooperation means the disintegration (instead of the integration) of the Union as a whole. On the other hand, if this requirement is taken too seriously, enhanced cooperation could never be established, since the instrument to be adopted under the enhanced cooperation will not contribute to the integration process of *all* Member States. The other two conditions – furthering the Union's objectives and protecting its interests – are more important. In this respect, the question is whether the area of international divorce law is too broad, and in fact too insignificant, to allow Europe to give up the unanimity which, to date, has always been achieved in cross-border family law matters. For these reasons, Fin-

[15] In the Regulation they are indicated as the non-participating Member States, whereas in the Brussels jargon they are characterized as the "unwilling" Member States.

[16] See Recital 8 which refers to Article 328(1) of the TFEU.

[17] Article 20 of the Treaty on European Union (TEU) and Articles 326 to 334 of the Treaty on the Functioning of the European Union (TFEU).

[18] See BOELE-WOELKI K., "To Be or Not to Be: Enhanced Cooperation in International Divorce Law Within the European Union", *Victoria University of Wellington Law Review* 2008, pp. 779-792.

[19] Article 20 (1) TEU.

land rightly requested an impact assessment of the enhanced cooperation, which regrettably has not been carried out.[20]

A. Why Rome III?

The main question concerning Rome III is why was legislation needed? In 2005, the European Commission stated in the Green Paper that an "international" couple wanting to divorce are subject to the uniform jurisdiction rules established in the Brussels II bis Regulation. These rules allow the spouses to choose between several applicable jurisdictions. Once a divorce proceeding is brought before the courts of a Member State, the applicable law is determined pursuant to the conflict of law rules of that State. There are significant differences between the national conflict of law rules. According to the Commission, these differences give rise to the following adverse effects: a) a lack of legal certainty; b) a lack of flexibility, c) results that do not correspond to the legitimate expectations of citizens and d) a risk of a "rush to court," because it is easier to obtain a divorce in certain Member States.[21]

One may expect that these statements, judgements and threats would have been supported by socio-legal data and research. The Commission relied first on research into "the possible practical problems resulting from the non-harmonization of choice-of-law rules in divorce matters,"[22] which was finalised three years before the Green Paper was published. At that time, the uniform jurisdiction rules had been in force for only 18 months.[23] The Commission also provided basic comparative information about the Member States' laws on the grounds for divorce, legal separation and marriage annulment and on the respective choice of law rules.[24] The Commission also provided some examples of divorcing couples all having a Member State nationality and habitually residing in the Union,[25] which aimed to illustrate how disastrous the situation was.

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[20] See the Statement of the Finnish delegation of 19 May 2010, Interinstitutional file 2010/0067 (CNS), JUSTCIV 99, JAI 437.

[21] Green Paper on applicable law and jurisdiction in divorce matters, COM(2005) 82 final.

[22] The study carried out by the T.M.C Asser Institute is available at: <http://europa.eu.int/comm/justice_home/doc_centre/civil/studies/doc_civil_studies_en.htm>.

[23] Council Regulation (EC) No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

[24] Commission Staff Working Paper, Annex to the Green Paper on applicable law and jurisdiction in divorce matters SEC(2005)331.

[25] The exception is Example 4, in which a German/Dutch couple live in a non-Member State. This example should exemplify that spouses should have the possibility to select the competent forum.