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

Katharina BOELE-WOELKI*

* Professor of Private International Law, Comparative Law and Family Law at the Molengraaff Institute for Private Law, Utrecht University, The Netherlands and Extraordinary Professor at the University of the Western Cape, South-Africa. E-mail: K.Boele@uu.nl. In 2007, she established the Utrecht Centre for European Research into Family Law (UCERF), see <www.ucerf.nl>. The author presented parts of this contribution on 27 January 2011 in the law faculty of Uppsala University at the occasion of the Annual Doctoral Graduation Ceremony.

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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.

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

[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.

[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

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 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

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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 *the 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.

[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).

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 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.

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[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).

[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.

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.

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

[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.

[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.

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, Finland 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

[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.

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

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.

More reliable information about "the risk of a rush to the courts" should have been provided by an evaluation report on the application of the uniform jurisdiction rules. Such a report is not due until the 1st of January 2012 –[26] almost nine years after these rules became effective. This delay is exceptionally long. According to the Brussels II Regulation, such a report should have been available on the 1st of March 2006,[27] but Brussels II was replaced by the Brussels II bis Regulation in March 2005, resulting in the new date for the report.[28]

For the 2012 report on the application of the Brussels II bis rules, it will be difficult to find any case law demonstrating that spouses rushed to the courts to

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[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.

[26] Article 65 Brussels II bis.

[27] Article 43 Brussels II.

[28] It should be kept in mind that during the evaluation period – 2001 to 2012 – no uniform conflict of law rules relating to divorce will have been applied in the Member States.

obtain a quick divorce.[29] If spouses are in agreement, there is no problem. However, if only one of them initiates the proceedings, the choice of law decision may also be based on other grounds, such as familiarity with the system, the availability of mediation, the recognition of a marriage contract,[30] the costs of the proceedings and other ancillary measures to be taken. It may also be more difficult to assess the couples' legitimate expectations. To discover what citizens and practitioners truly experience, an unprejudiced questionnaire for the evaluation report should be drafted. However, since Rome III can now be taken as given, the evaluation report will be of little interest to the question whether or not conflict of law rules are needed. In this respect, the evaluation will come too late.

Another profane reason for the adoption of Rome III might be that two big brothers currently accompany this regulation: Rome I on the law applicable to contracts and Rome II on the law applicable to non-contractual obligations.[31] This explains not only the commonly used abbreviation *Rome* – indicating that the instrument contains conflict of law rules – but also the Roman numeral III.[32] A similar development took place for recognition and enforcement of jurisdiction. Brussels I, which contained these procedural rules for civil and commercial matters,[33] was complemented with Brussels II, for matrimonial matters, and was later amended by the Brussels II bis. Moreover, initially the Community's jurisdiction and recognition rules were to be complemented with conflict of laws rules relating to divorce by amending Brussels II bis.[34]

As a result, the reasons why uniform conflict of law rules relating to divorce and legal separation were needed are unconvincing. Nevertheless, the adopted

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[29] In none of the twenty national reports in BOELE-WOELKI K./ GONZÁLEZ BEILFUSS C. (eds), *Brussels II bis, Its Impact and Application in the Member States*, Antwerpen: Intersentia, 2007, has any case law been reported which show that the jurisdiction rules have been misused. See also the Comparative Synthesis by K. BOELE-WOELKI/C. GONZÁLEZ BEILFUSS, pp. 23-40.

[30] See Radmacher v. Granatino, Supreme Court decision of 20 October 2010, [2010] UKSC 42.

[31] OJ L 177/6: Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (*Rome I*) and OJ L 199/40: Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (*Rome II*).

[32] Besides, some rules of the Rome III Regulation are copied from the Rome I and Rome II Regulations.

[33] OJ L 12/1: Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*Brussels I*) and *Brussels II bis*.

[34] The proposed *Rome III* Regulation contains two significant elements: (1) spouses were to be allowed to jointly select a competent court; and (2) conflict of laws rules for cross-border divorce cases were to become part of Community law. See POCAR F., "Osservazioni a margine della proposta di regolamento sulla giurisdizione e la legge applicabile al divorzio", in: BARIATTI S. (ed), La famiglia nel diritto internazionale privato comunitario, 2007, pp. 267-278.

Rome III Regulation states that it should "provide citizens legal certainty, predictability and flexibility."[35]

B. The Reasons Not to Participate

Thirteen Member States do not participate in Rome III for various reasons, which are based on the content of the proposed uniform conflict of law rules[36] or are solely for political reasons. Denmark is an exception, since it does not participate in the adoption of any communitarian private international law instrument.

Dark: 14 participating Member States
Light: 13 non-participating Members States

[35] Recital 9 Rome III continues: "…and prevent a situation where one of the spouses applies for divorce before the other one does in order to ensure that the proceeding is governed by a given law which he or she considers more favourable to his or her own interests."

[36] See for a comparison between Rome III Proposal and the American approach: SILBERMAN L., "Rethinking Rules of Conflict of Laws in Marriage and Divorce in the United States: What Can We Learn from Europe?", Tulane Law Review, 2008, pp. 1999-2020.

Passionate and extensive discussions about the content of the new conflict of law rules took place in the run-up to the adoption of the Rome III Regulation.[37] The final result is that the parties are allowed to designate the applicable law, but spouses can select only a law with which they have a close connection.[38] In the absence of such a choice, a multi-stage conflict of laws rule uses the (last) habitual residence of the spouses or their common nationality.[39] Both rules can lead to the application of foreign law, including not only the law of another Member State but also the law of third-country jurisdictions.

However, the application of foreign divorce law was and still is unacceptable for some Member States. They favour as a basic rule the application of the *lex fori*. The United Kingdom, Ireland and Cyprus are the most well-known countries which have adopted this approach, due to the common law tradition that a competent court always applies its own law. From the outset, however, it was clear that the United Kingdom and Ireland would not participate in Rome III, since under the Treaty of Amsterdam they have retained the right not to opt into instruments that are inconsistent with English or Irish law.

Instead, Sweden and Finland took the lead. They passionately objected to the proposed conflict of law rules. In these jurisdictions, the right to divorce is considered a fundamental right. As a result, in those Member States "a spouse should be free to end a marriage without risking time-consuming or costly proceedings," and it has been stated that the "basically unlimited right to divorce is also an important issue of equality between men and women."[40]

The Netherlands also belongs to the group of *lex fori* countries, but for a different reason. During the last 30 years, case law has shown that under the existing statute[41] Dutch law has been applied in the vast majority of cases. Therefore, the Bill in 2009 providing for Book 10 of the Dutch Civil Code regulating private international law[42] applies the *lex fori* unless a common national law is designated

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[37] See for all the arguments that have emerged: DE BOER Th.M., "The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law", in: BOELE-WOELKI K./ SVERDRUP T. (eds), *European Challenges in Contemporary Family Law*, European Family Law Series No. 19, 2008, pp. 321-341; See further JÄNTERÄ-JAREBORG M., "Jurisdiction and Applicable Law in Cross-Border Divorce Cases in Europe", in BASEDOW J./ BAUM H./ NISHITANI Y. (eds.), *Japanese and European Private International Law in Comparative Perspective*, 2008, pp. 317-343; LAZIĆ V., "Recent Developments in Harmonizing «European Private International Law» in Family Matters", European Journal of Law Reform 2008, pp. 75-96.

[38] See under 4.3 Choice of the applicable law.

[39] See under 4.4 The applicable law in the absence of any choice.

[40] See JÄNTERÄ-JAREBORG M. (note 37), p. 340.

[41] Which dates from March 1981 and takes the application of the law of the parties' common national law as a starting point.

[42] *Vaststelling en invoering van Boek 10 (Internationaal privaatrecht) van het Burgerlijk Wetboek (Vaststellings- en Invoeringswet Boek 10 Burgerlijk Wetboek)*, Lower House, 32 137. It received the approval of the Council of State, the Lower House and the Upper House and will enter into force on 1 January 2012.

by both parties or such a designation by one party is not contested by the other.[43] As a result, the Dutch decision not to participate in the enhanced cooperation was easily made.[44]

The other six non-participating Member States also decided not to take part in Rome III, for varying reasons. In the Czech Republic, a political decision "against Europe" was taken despite the position of Czech specialists in private international law, who supported the cooperation. The Czech Republic is likely to follow the experience of the participating countries and may eventually reconsider its position.[45] Estonia also did not favour enhanced cooperation, since it would create a precedent within the framework of cross-border civil cooperation and its implications were not thoroughly analyzed. However, Estonia might join in at a later stage.[46] In contrast, Lithuanian family policy – supported by the ruling conservative party and the influential Catholic Church – prescribes that the legal regulation of family relationships should be the exclusive area of national law.[47] Poland also made a political decision, fearing that Rome III would allow same-sex couples to obtain a divorce in Poland.[48] Apparently, the Polish delegation overlooked the fact that this precise concern was later addressed in one of the provisions.[49] Slovakia rejected enhanced cooperation for many reasons. First, it believes that the enhanced cooperation mechanism should not be used for private international law.[50] Second, it feared that fault-based divorces would become applicable through backdoor methods. Third, the rules on legal separation cannot be applied in Slovakia since the institution does not exist. And finally, Slovakia still considers divorce to be a "State controlled" institution, which is irreconcilable with the

[43] Article 10:56 Dutch Civil Code.

[44] DE BOER TH.M., Europese oogkleppen: waarom de Verordening Rome III voor Nederland geen optie is, 5e UCERF symposium 2011, pp. 73-86.

[45] Information provided by Monika Pauknerová, Charles University, Prague.

[46] Information provided by Karin Rammo, Ministry of Justice of Estonia.

[47] Information provided by Valentinas Mikelėnas, a lawyer and former Justice of the Supreme Court of Lithuania.

[48] Information provided by Monika Jagielska, University of Silesia in Katowice.

[49] Article 13 Rome III.

[50] Finland also regrets that enhanced cooperation has been used. See Interinstitutional file 2010/0067 (CNS), Annex IV. These concerns are reflected in Recital 29 Rome III: "Since the objectives of this Regulation, namely the enhancement of legal certainty, predictability and flexibility in international matrimonial proceedings and hence the facilitation of the free movement of persons within the Union, cannot be sufficiently achieved by the Member States and can therefore, by reasons of the scale and effects of this Regulation be better achieved at Union level, the Union may adopt measures, by means of enhanced cooperation where appropriate, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives."

notion of party autonomy.[51] Greece initially joined the group of countries requesting enhanced cooperation. Yet, due to its drastic cost-cutting measures in 2009 caused Greece to dissolve all advisory commissions without justification and revoke its request.[52]

IV. The Main Provisions

A. Material Scope

According to Article 1(1) of Rome III, the Regulation shall apply to divorce and legal separation[53] in situations involving a conflict of laws.[54] As a result, two requirements must be fulfilled.

First, the conflict must concern either a divorce, which terminates a marriage, or a legal separation, which loosens the marital bond (by removing the obligation to cohabit without dissolving the marriage). The dissolution of the marriage after a judicial (legal) separation, which is distinct from both divorce and legal separation, is not mentioned in Article 1(1). However, it can be derived from Article (that the "conversion of legal separation into divorce" is also covered. According to Article 1(3), a "court" can either be a judicial or an administrative body.

Second, the rules of the Regulation are applied only if the divorce or legal separation has cross-border aspects. The Regulation does not specify the situations in which a conflict of laws is involved. Obviously, however, if spouses have different nationalities or habitual residences at the time the competent authority is seized, the applicable national law must be determined.

The question arises as to whether any international aspects which occurred during the marriage must also be taken into account. Suppose the wife is German and the husband is Dutch at the time of the marriage. During the marriage, the husband opts for German nationality and, as a result, loses his Dutch nationality. The spouses live in Germany and request a divorce in Germany. Are the connections with Germany at the time the court is seized the only connections taken into account (internal relationship), or should other relevant connecting factors during the marriage also be considered? It is reasonable that the answer to the latter question should be in the affirmative, since the spouses could have made a choice for Dutch law to apply to an eventual divorce at the moment the husband still had Dutch nationality. Such a choice of law must be recognized by the courts in Ger-

[51] Information provided by Miloš Haťapka, Ministry of Justice of the Slovak Republic.

[52] Information provided by Achilles Koutsouradis, University of Thessaloniki.

[53] Recital 9a stresses that the material scope of Rome III should be consistent with Brussels II bis, however Rome III should not apply to marriage annulment.

[54] The same formulation of the material scope is used in Art. 1(1) Rome I and Art. 1 (1) Rome II.

many according to Article 5. This means that the Regulation also applies if during the marriage one of the spouses had a foreign nationality or his/her habitual residence in a country other than the one where the divorce proceedings are commenced.

Finally, it should be noted that Rome III speaks of only "spouses," which includes same-sex couples but excludes registered partners. The dissolution of registered partnerships does not fall within the scope of application.

B. Universal Application and Exclusion of *renvoi*

The national conflict of law rules of the fourteen participating Member States will be replaced by the conflict of law rules of Rome III. According to the firmly rooted principle in the private international law instruments of the EU and the Hague Conference on Private International Law, Rome III has a universal scope of application. Article 4 provides that the law designated[55] by the Regulation shall apply whether or not it is the law of a participating Member State. Intra-Union and extra-Union situations are dealt with on an equal basis.

In accordance with the generally accepted rule in private international law, Article 11 excludes *renvoi*. According to this provision, the designation of a law under the rules of the Regulation means designating the substantive rules of that law (*Sachnormverweisung*). The conflict of law rules of the law which has been designated are not to be consulted. The exclusion of *renvoi*, however, would have been better "located" in Chapter I rather than in Chapter II, where it has been put in between two provisions dealing with corrections (Article 10 on the Application of the law of the forum and Article 12 on Public policy) to the law that has been determined by Article 5 (Choice of law by the parties) and Article 8 (Applicable law in the absence of a choice by the parties).

C. Choice of the Applicable Law

The uniform conflict of law rules contained in Chapter II (Articles 5-16) begin by addressing the situation where the spouses agree on the applicable law. The freedom to choose provides legal certainty for the spouses and is to be welcomed. Their choice of the applicable divorce law must be recognized by the court. The spouses' reasons for choosing one of the several options provided by Article 5[56] may vary. One can think of the liberal divorce grounds of the selected law – *e.g.* a factual separation is not required – which makes it easy to obtain a divorce. The choice of the *lex fori* might depend on where the divorce proceedings take place. In turn, this "choice of forum",[57] which may be based on one of the many grounds for

[55] Art. 2 Rome I/Rome II use the term "specified".

[56] See under 4.3.1.

[57] In a strict sense a choice of forum is not possible under the Brussels II bis Regulation.

jurisdiction in Article 3 of Brussels II bis, may be influenced by several aspects, such as the costs of the proceedings, the remuneration for lawyers, the familiarity with the procedure and/or the mediation facilities. Finally, only the courts of the country where the spouses' children have their habitual residence are generally competent to decide on parental responsibilities and contact between the children and the non-resident parent. Thus, the spouses may want a court competent to decide not only on the divorce, but also all its consequences.

1. Which Laws May Be Chosen?

Depending on *when* the spouses choose the applicable law, two, three or four options are available.[58] They may select a law under the following rules:

- I. at the moment of marriage or shortly afterwards (marriage contract)

1. the law of their habitual residence (Article 5 (1) sub. a) *or*
2. the law of their nationalities (Article 5 (1) sub. c)

- II. during the marriage

the laws indicated under I *or*

3. the law of their last habitual residence if one of the spouses still resides there (Article 5 (1) sub. b).

- III. at the end of the marriage (separation/divorce contract)

the laws indicated under II *or*

4. the law of the *lex fori* (Article 5 (1) sub. d)

Once the spouses have determined the applicable law, they are bound by their choice until and unless they both agree to a modification. This may occur at any time before the court is seized.

2. The Time Element

Article 5 gives spouses many options. However, spouses may only choose the law with which they have a close connection.[59] They must be either nationals of or have their (last) habitual residence in the country whose law they choose. This close connection does not necessarily need to refer to both spouses. Also the nationality of one spouse is sufficient to express a connection between the chosen divorce law and the spouses. In addition, such a connection must exit at the time when the agreement is concluded between the spouses. For example, a court might be confronted with the questions of whether at the time the agreement was concluded both spouses had had their last habitual residence in the country whose law had been chosen and whether at that moment one of the spouses still resided in that

[58] These moments in time are not specified in Art. 5; however, it follows from the connecting factors that different situations can be distinguished. A joint habitual residence of the newly-weds, for example, can be established only after the marriage; the period of cohabitation before the marriage is not taken into account.

[59] Recital 16 speaks of a "special connection".

country (Article 5 (1) sub. b). Eventually, these facts will be established and proven after many years. Moreover, a close connection with the law chosen at the time the agreement may no longer exist at the moment of the divorce.

Additionally, Article 5's failure to impose any time limits for the spouses to conclude an agreement about the applicable divorce law can be questioned. A choice of law is possible and subsequently binding when it has been made many years earlier – such as in a marriage contract – when the spouses usually were not thinking of a divorce. Admittedly, in "big money" marriages,[60] many spouses – or at least their legal advisors – are aware of the fact that more than 30% of all new marriages will end in divorce. From the advisors point of view, it is reasonable to stipulate both the jurisdiction and applicable law for a possible divorce. However, only the choice of the applicable divorce law will bind the spouses according to Rome III. A choice of forum is not binding on spouses, since Brussels II bis does not (yet) allow the parties to select the competent court.

Moreover, following the conclusion of the agreement, certain circumstances and connecting factors (nationality and habitual residence) might change. These changes will not be taken into account unless both spouses agree to change their initial choice of law. If one of the spouses is unwilling to modify the agreement, the other spouse has no option other than to resign him/herself to the original choice. To protect the spouses from a thoughtless and uninformed choice of law, the Dutch legislator has restricted the spouses' ability to designate the applicable divorce law to the moment that the court is seized.[61] Assumingly, the spouses make a more thoughtful and informed choice concerning the applicable divorce law at the moment they want to terminate their marriage, rather than at the moment they enter into the marriage, which may have occurred many years or even decades earlier.

3. Formal Requirements

To ensure that spouses are aware of the implications of their choice, the agreement must be expressed in writing,[62] dated and signed by the spouses (Article 7 (1)). The question arises whether these safeguards sufficiently ensure an informed choice by the spouses which, according to Recital 18, is considered to be a basic principle of the Regulation. In connection with the drafting of both the Maintenance Regulation[63] and the Hague Protocol on the Law Applicable to Maintenance of 2007,[64] it

[60] See, for example, the most recent decision of the UK Supreme Court of 20 October 2010, Radmacher *v* Granatino, [2010] UKSC 42.

[61] See Art. 10:56 (2) Dutch Civil Code (Bill).

[62] Communications by electronic means which provide a durable record of the agreement are equivalent to writing. See also Article 4 (2) for the choice of forum in the Maintenance Regulation.

[63] Art. 3(2) Maintenance Regulation: "A choice of court agreement shall be in writing. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to «writing»."

has been frequently advocated that legal advice should be mandatory in connection with a choice of forum or a choice of law.[65] This rationale also applies in the context of a choice of the applicable divorce law. Recital 17 refers to good-quality information about divorce law which the Commission provides in its European Judicial Network in civil and commercial matters. Yet, this "solution" is insufficient. The Internet-based public information system covers only the laws of 27 Member States, it is not regularly updated,[66] the information provided is incomplete and, finally, information about non-Union systems is unavailable.[67] Last but not least, the legal information provided is difficult for non-lawyers to understand.

D. The Applicable Law in the Absence of any Choice

In many cases, spouses have not agreed on the law to be applied. It is possible that they did not know that they have the option or, more likely, they disagree about which law should be chosen. It is also conceivable that one of the spouses – as a matter of principle – does not want to comply with the other spouse's suggestion, refuses to sign any agreement or does not react at all. In these situations, the law to be applied is objectively to be determined by the court. Article 8 provides a four-step default rule. *Successively*, the following laws apply:

- 1st: The law of the habitual residence of the spouses at the time when the court is seized. (Article 8 sub. a)
- 2nd: The law of the last habitual residence of the spouses, subject to the following two conditions:

a) the joint habitual residence of the spouses did not end more than one year before the court was seized *and*

b) one of the spouses still resides there (Article 8 sub. b).

- 3rd: The law of the common nationality of the spouses at the time when the court is seized (Article 8 sub. c).
- 4th: The *lex fori* (Article 8 sub. d)

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[64] Article 8 (2) Hague Protocol on the law applicable to maintenance 2007: "Such agreement shall be in writing or recorded in any medium, the information contained in which is accessible so as to be usable for subsequent reference, and shall be signed by both parties."

[65] See BOELE-WOELKI K./MOM A., "Vereinheitlichung des internationalen Unterhaltsrechts in der Europäischen Union: ein historischer Schritt", Familie, Partnerschaft und Recht 2010, pp. 485-489.

[66] The information on Dutch divorce law, for example, does not mention the obligation of the spouses to submit a parenting plan for their children. Without such a plan, a divorce cannot be obtained. This requirement was introduced into Dutch law on 1 March 2009.

[67] The Commission on European Family Law (CEFL) provides on its website, <www.ceflonline.net>, detailed information about various European family law systems. The comparative material is also published in the European Family Law series, see <www.intersentia.be> in 2003 (divorce and maintenance between former spouses), 2005 (parental responsibilities) and in 2009 (property relations between spouses).

The application of Article 8 can be illustrated by the following example of a Swedish-Finnish couple who lived in Sweden before they separated. Upon the separation, one spouse moved to Finland and the other to Belgium. At the time when the court in Belgium is seized they have no joint habitual residence (Article 8 sub. a). They had also their last joint habitual residence in Sweden, but neither of them still resides is Sweden (Article 8 sub. b). They also have no common nationality (Article 8 sub. c). Thus Belgian law applies as the *lex fori* (Article 8 sub. d). If the divorce proceedings commence in Finland, the courts will also apply the *lex fori* as a result of applying the Finnish conflict of law rules.

1. Last (Habitual) Residence and Nationality Indicate a Close Connection

Recital 21 of the Proposal stresses that the connecting factors chosen in Article 8 should ensure that proceedings relating to divorce or legal separation are governed by a law with which the spouses have a close connection. Article 8 gives priority to the law of the (last) habitual residence of the spouses. The last common habitual residence of the spouses is subject to two conditions: one of the spouses must still reside there *and* the joint habitual residence should not have ended more than one year before the court was seized. As a result, it is a complicated connecting factor. This author has been unable to determine why it was selected.

2. Dual Nationality

If at least one of the spouses has dual nationality, a question arises as to how the courts will apply the connecting factor of nationality as used in Article 5 (1) sub. c and in Article 8 sub. c. Recital 22 states that the issue is left to national law, so as to fully respect the general principles of the European Union. The issue then becomes how "the full respect of the general principles of the European Union" should be interpreted. As for Article 3 (2) Brussels II bis, the European Court of Justice (ECJ) in the *Hadadi/Mesko*[68] case held that this article cannot be interpreted differently according to whether the two spouses have the same dual nationality or only one common nationality. The case involved a Hungarian-French couple holding both nationalities who had not lived in Hungary for a long time. Their only link with that country was their Hungarian nationality. The ECJ decided that the Hungarian courts had jurisdiction. In other words, the most effective nationality need not be determined.

It is questionable whether this approach can be applied. Generally, a distinction is made between jurisdiction and the applicable law. Due to the requirements of legal certainty, formal nationality is usually a sufficient ground for jurisdiction. When a determination of the applicable law is concerned, the situation is different. The proposed reference to national law is consistent with the generally accepted approach in private international law instruments, such as the Hague

[68] ECJ 16 July 2009, case C-168/08, *OJ* 17 September 2009, C220, p. 11.

Conference on Private International Law. Two possibilities exit. A person with dual nationality is considered a national of only the State with which he is effectively linked or preference is given to the internal law if the person possesses the nationality of this country, irrespective of whether the person possesses another nationality. With regard to a choice of law by the spouses according to Article 5 (1) sub. C, it can be argued that the final choice of the applicable law is made by the spouses and, therefore, a formal nationality may also serve that purpose. However, for the application of the default rule, Article 8, national law will be consulted. Yet, that leaves unanswered the question of which general principles of the European Union are to be taken into account in that national law?

V. Some Open and some Hidden Standards

Rome III contains both open and hidden standards. These standards will be exemplified by focussing on the following issues which emphasize the considerable differences in substantive divorce laws.

A. The Non-Application of Discriminatory Divorce Law

One of the main arguments of the Member States who chose not to engage in Rome III was that the proposed conflict of law rules might lead to the application of foreign law. Although *Rome III* accepts the outcome of applying foreign law, a few "safety mechanisms" have been introduced to prevent that result. Article 10 provides that when the applicable divorce law fails to grant one of the spouses equal access to divorce or legal separation on grounds of her sex, even if that law has been chosen by the spouses, the law of the *forum* shall apply instead. To a certain extent the arguments of those Member States, such as Sweden, have now been addressed in Rome III. The application of the *lex fori* provides the solution. It safeguards the fundamental principle of equality between spouses.

The public policy exception is explicit, and, generally, this clear position is welcomed.[69] Suppose that French courts are invoked to dissolve the marriage of a Moroccan couple. For over two years only one of the spouses has lived in France. According to Article 8 sub. c, Moroccan law should be applied as the law of the common nationality of the spouses. Does Moroccan law belong to the legal systems which violate the principle of equal access to divorce for men and women? Is this to be assessed more generally or in the specific case? With such a sensitive matter involved, some guidance from the Communitarian legislature would have been advisable. Moreover, the non-application of Moroccan law may cause problems for the individual spouses. They cannot remarry in Morocco because a for-

[69] One wonders what will be covered by Article 12 Rome III, which contains the general public policy exception.

eign divorce that has not been pronounced according to Moroccan law is not recognized there. Limping relationships are pre-programmed.[70] In our multicultural societies in Europe, these problems should also be adequately addressed. One possibility would be for the European Commission to promote the ratification of the Hague Convention on the recognition of divorces and legal separations of 1970 to which, for instance, Egypt is also a contracting state.

B. The Accommodation of Malta

It is striking that Malta is a participating Member State of Rome III, since Maltese law does not allow either divorce or the dissolution of a marriage after legal separation. Only a legal separation which is included within the scope of Rome III can be obtained in this country. One may wonder, however, how often legal separation procedures with cross-border elements occur in Malta. Three provisions of the Rome III Regulation specifically apply to the Maltese situation. It goes without saying that this fact is not explicitly stated.

The most troublesome provision concerns the dissolution of a marriage after legal separation. The Communitarian legislature has simplified this procedure. A legal separation will be converted into a divorce and not into the dissolution of the marriage, despite the fact that the dissolution of the marriage is different from divorce under the substantive family laws of the Member States which still have this institution. Testing the outcomes of the conversion provision reveals the following result. Imagine a Maltese couple living in Germany. Some years ago they obtained a legal separation in Malta and now they want to dissolve their marriage. One or both of them can go to court only in Germany. First, the German court must consult the law which applied to the legal separation.[71] Maltese law does not provide for the dissolution of the marriage after legal separation. The parties – supposing that they are in agreement – can choose German law as the law of their joint habitual residence.[72] If they make no choice the result is identical. Only German law is applies as the law of the common habitual residence.[73] German law, however, neither provides for legal separation nor for the dissolution of the marriage after legal separation. This would be possible only in Belgium, France, Italy, Luxembourg, Portugal and Spain; yet the couple has no connections with these countries. What should they do? Under current German private international law, German divorce law may be applied by referring to the public order exception and to constitutional law.[74] However, in the future the conflict of law rules of Rome III

[70] ANDRAE M., "Kollisionsrecht nach dem Lissabonner Vertrag", Familie, Partnerschaft, Recht 2010, pp. 505-510 (508).

[71] Article 9 (1) Rome III.

[72] Article 9 (1) in connection with Article 5 under a Rome III.

[73] Article 9 (2) in connection with Article 8 under a Rome III.

[74] Article 6 EGBGB in connection with Article 6 Basic Law; see Bundesgerichtshof NJW-RR 2007, 145.

leave the couple empty handed. Only Recital 23 provides a solution: "This should not prevent the spouses from seeking divorce on the basis of other rules in this Regulation." However, what is the legal status of recitals?

Less complicated are the Rome III rules referring to a law that makes no provision for divorce. This means that the law generally does not provide for the institution of divorce.[75] The only Member State that falls under this category is Malta. If Maltese law would be applicable, the courts seized may apply their own law according to Article 10. They "solve" the Maltese problem and this result, in turn, is recognized in Malta. According to the Brussels II bis recognition rules, divorces obtained abroad should be recognized in Malta when one of the spouses possesses a non-Maltese nationality or has a habitual residence outside Malta. This leads to a circular and truly hypocritical situation. On the other hand, from the point of view of the participating Member States, the possibility to refer to the *lex fori* can be considered as the acknowledgment of a right to divorce. Is this a hidden standard?

However, in the mirror situation Maltese courts are *not* obliged to grant a divorce, even if foreign law should be applied according to the rules of Rome III. Article 13 – with the meaningless title "differences in national law" –[76] establishes this exception and denies EU citizens the right to divorce. It is clear who got the better deal. Malta sends out the message that a marriage cannot be dissolved. It states that compelling Malta to introduce divorce into its substantive law by virtue of a Union instrument would be going beyond the Union's competence,[77] while the participating Member States accommodate Malta's outdated view on marriage.[78] Astonishingly, the Member States did not object to including such a rule into a European Regulation that claims to facilitate the free movement of persons within the Union. In addition, this regulation aims to respect fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular its anti-discrimination provision (Article 21).[79] All in all, Article 13 gives the wrong signal.

In conclusion, the "Malta provisions" illustrate that Malta should have first introduced divorce before taking part in a Regulation on divorce. This might happen in the future. A Private Member's Bill introducing the Family Law (Divorce) Act was submitted to the Maltese House of Representatives in July 2010.[80] How-

[75] See Recital 26 which only refers to the law of a participating Member State.

[76] Since by definition conflict of law rules operate because of differences in national law, the title makes no sense.

[77] See the declaration by Malta on Article 7a (which later became Article 13 Rome III), Interinstitutional file 2010/0067 (CNS) Annex III.

[78] But see the declaration of the European Commission on Article 7a (which later became Article 13 Rome III), Interinstitutional file 2010/0067 (CNS) Annex II.

[79] Recitals 29 and 30 Rome III.

[80] See <http://www.maltatoday.com.mt/news/jeffrey-pullicino-orlando/pullicino-orlando-presents-divorce-law-to-parliament>. The Prime Minister has openly declared that he is against recognizing divorce, while the leader of the opposition is in favour of it.

ever, the Catholic Church strongly opposes it.[81] A consultative divorce referendum was held in Malta on 28 May 2011.[82] 52, 67% were in favour of divorce and the Prime Minister announced that he will abide the result.

C. The Accommodation of Countries Which Do Not Recognize Same-Sex Marriages

Finally, the accommodation of countries which do not recognize same-sex marriage presents another hidden standard. Imagine that a same-sex couple of different nationalities entered into a marriage[83] in a Member State. This could be Belgium, the Netherlands, Spain or Sweden.[84] Then they moved to another Member State where same-sex marriages are neither permitted nor recognized. One of them or both now want a divorce.

According to Brussels II bis, they can only seize the court at their (last) habitual residence. This court must first decide whether the marriage is recognized, otherwise a divorce cannot be granted. These preliminary questions on the existence, validity or recognition of a marriage are *explicitly excluded* from the scope of the Rome III Regulation.[85] This means that the preliminary question is answered independently from the main question and either international or national recognition rules are consulted. If, according to these rules, the marriage is not recognized, no divorce can be granted. Surprisingly, Article 13 addresses the preliminary question, providing that courts whose law does not deem such a marriage to be valid are not obligated grant a divorce. Apparently, this superfluous provision was drafted to address the concerns of those Member States that do not want to recognize same-sex marriages, such as Poland.[86] However, this provision violates the principle of the free movement of citizens, the right to divorce, and the right to have access to justice and ultimately proves that Rome III fortifies traditional family law values.

As a result, same-sex couples requesting a divorce in a Member State other than the country where the marriage was granted are out of luck until Brussels II bis is amended by the addition of a choice of forum and a *forum necessitatis*. The

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[81] See <http://www.maltatoday.com.mt/news/divorce/divorce-a-matter-of-informed-conscience-say-theologians-in-new-declaration>.

[82] The following question was posed: "Do you agree with the introduction of the option of divorce in the case of a married couple who has been separated or has been living apart for at least four (4) years, and where there is no reasonable hope for reconciliation between the spouses, whilst adequate maintenance is guaranteed and the children are protected?"

[83] The dissolution of registered partnerships is not covered by Rome III.

[84] In some jurisdictions in Europe, in the USA (in some states), in parts of Latin America and in South Africa, same-sex couples may enter into a marriage.

[85] Article 1 section 2 under b.

[86] The non-recognition of child marriages and forced marriages might also play a role, but these issues are also dealt with by marriage recognition rules.

latter has been put on the European Commission's agenda.[87] Thus the second amendment of Brussels II is expected and welcomed.

VI. The Impact of Rome III

What impact does Rome III have on international divorces between EU citizens? Will it be more attractive to bring proceedings before the courts of a participating Member State? Or will it be better to remain outside the Rome III regime? A one size fits all answer cannot be provided. Instead, the various factors of the individual case are decisive. Undoubtedly, citizens will be interested in only their specific case. They want to know which law will be applied and the conditions and consequences for their divorce. To find these answers, they consult lawyers who are expected to be specialised in international family law. These lawyers should first consider where to commence proceedings.

A. The Decision on Where to Commence Divorce Proceedings

Rome III is not a stand-alone regulation. All Member States are obliged to apply the jurisdiction rules of the Brussels II bis Regulation. As a result, spouses can bring divorce proceedings before the courts of different Member States. To date, it has *not* been proven that couples use the various jurisdiction grounds in the Regulation to obtain an easy divorce in a country with which they have no connection. If this phenomenon does not take place under the uniform European jurisdiction rules, Rome III cannot solve a non-existing problem.

If spouses do not agree on where to start divorce proceedings and, instead, individually decide to seize a court in a different Member State, the so-called "lis pendens" mechanism of Article 19(1) of Brussels II bis intervenes. This provision addresses the problem of parallel actions and the possibility of irreconcilable judgments. As a result, once a court has been seized the second court must stay proceedings until the jurisdiction of the first court seized has been established.[88]

[87] See Interinstutional file 2010/0067 (CNS), Annex I.

[88] See PERTEGÀS M., "The Impact and Application of the Brussels II bis Regulation in Belgium", in: BOELE-WOELKI K./GONZÁLEZ BEILFUSS C. (eds), *Brussels II bis, Its Impact and Application in the Member States*, 2007, pp. 57-68 (60) who criticises this rule and suggests that the time might be right for including in this rule considerations on the appropriateness of the forum. See also HELIN M., "The Impact and Application of the Brussels II bis Regulation in Finland", in: in: BOELE-WOELKI K./GONZÁLEZ BEILFUSS C. (eds), *Brussels II bis, Its Impact and Application in the Member States*, 2007, pp. 91-102 (94) who notes that the *lis pendens* rule is difficult to reconcile with a *favor divortii* policy, because if a legal separation is pending before a court of a Member State, the second court seized will have to stay the divorce proceedings.

This rigid rule "hits like a mousetrap".[89] The disappointment of the spouse who arrives too late is huge. Take, for instance, the case where the spouses brought divorce proceedings before French and English courts on the same day. The wife had evidence of the exact time of the day, 12:30 p.m., when her husband was served with the English divorce documents; by contrast, the husband was unable to prove when the French court had been seized. The French *Cour de cassation* decided that the English court was first seized.[90] This may have significant effects on the financial consequences of a divorce. London, for instance, has been characterized as the Divorce Capital of the World,[91] where big-money divorce cases have been decided to the detriment of one spouse and to the benefit of the other. Such an attractive prospective may lead to a spousal competition to seize a specific court first.

Thus, the decision on where to commence proceedings is essential, and legal practitioners play a central role in making the right choice. The competent court will determine the applicable law. And Rome III is to be taken into account when the court seized is located in a participating Member State. Undoubtedly, from June 2012 onwards, it will be easier to predict which divorce law the Member States' courts will apply. Their different national conflict of law rules will no longer be consulted. For this reason, it is of the utmost importance that legal practitioners in non-participating Member States also become familiar with Rome III. This is part of the matrimonial law "game".

However, divorce is one thing and ancillary measures another. The decision to commence divorce proceedings in one of the Member States might be dependent on whether or not a marital agreement will be recognized. This was the stumbling-block in the *Radmacher v. Granatino* case decided last October by the English Supreme Court.[92] *Before Radmacher*, it was totally uncertain whether ante-nuptial agreements would be recognized by an English court,[93] even if the spouses had designated a foreign law to apply to their property relation.[94]

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[89] JÄNTERÄ-JAREBORG M. (note 5), p. 505.

[90] Cour de Cassation 11 June 2008, Arrêt n° 452.

[91] THORPE M., "London – The Divorce Capital of the World", European Journal of Law Reform 2009, pp. 65-76.

[92] See note 30 and MILES J./ SCHERPE J.M., "The Future of Family Property in Europe", in: BOELE-WOELKI K./ MILES J./ SCHERPE J.M. (eds),*The Future of Family Property in Europe*, 2011, pp. 421-430 (422).

[93] See the UK Law Commission's latest consultation paper on Marital Property Agreements, available at <www.lawcom.gov.uk/marital_property.htm>.

[94] The Supreme Court explicitly considered the foreign elements of the case to be irrelevant, see recital no. 74. If the wife would have established her habitual residence in Germany for at least six months, she could have seized a German court under Brussels II bis, which would have recognized the martial agreement of the spouses.

B. Future International Family Legislation

Finally, a legislative issue deserves attention. What role will Rome III play in the future, given the still unfinished state of the European edifice designed for all private international law rules? Predicting the future is like looking into a crystal ball, since we have experienced that many decisions in Brussels are politically motivated. However, some reflections easily come to mind.

The most pertinent question is whether Rome III will function as a precedent. Potentially, when new regulations dealing with international family law are adopted, the same reasons that some Member States refused to join Rome III might again be raised. When entering the Union in 2004/2007, the new Member States had to accept the *acquis communitaire* to which the uniform rules of Brussels II bis also belong. Hence, some of these Member States might argue "thus far and no further". Rome III shows that this position is an option and that some Member States are allowed to build their own, smaller house. On the other hand, the Maintenance Regulation shows that uniformity can be attained. But the Maintenance Regulation came before the adoption of Rome III.

In addition to the reluctance towards more European legislation, the content of the new international family law rules may lead to a second or even third enhanced cooperation instrument. The current views about the proposed rules in the field of inheritance, for instance, are miles apart. Almost unbridgeable differences exist between the common and civil law countries, and already at this stage we can predict that the United Kingdom and Ireland will most likely refused to opt into an instrument containing conflict of law rules. Together with Denmark, they will remain on the outside.

The property relations of international couples constitute another example. In March 2011, the Proposal for a Union-wide Regulation of cross-border aspects of matrimonial property regimes[95] was published together with the Proposal for a Regulation of the property consequences of registered partnerships.[96] These Proposals cover jurisdiction, applicable law and the recognition and enforcement of decisions. The property relations of international couples will be regulated in two different Regulations since in only 15 Member States same-sex couples are allowed to formalize their relationship. Taking into account that some Member States do not want more European intervention into their international family law it is to be expected that the Regulation on the property consequences of registered partnerships will be adopted under the enhanced cooperation procedure.

As a result, in the future it will be difficult to adopt a Union-wide or 24 Member State-binding Regulation addressing international family matters. Rome III illustrates how the emergency exit looks. Enhanced cooperation makes it possible to not only move forward, but also to follow a different path to preserve national legal solutions or because of political restraint. Some Member Sates will cherish these possibilities.

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[95] COM(2011) 126/2.

[96] COM(2011) 127/2.

VII. Epilogue

"For better or for worse" is the phrase used in traditional marriage ceremonies whereby the spouses promise to stay together in good and in bad times. With the European Treaties, the Member States have vowed to do the same. So far, no Member State has left the Union. However, in the attempt to improve the life of European citizens by enacting uniform conflict of law rules for divorce, the collaborative process has come to an end. Different paths are being pursued. Divorce brings a marriage to an end, and it is remarkable that a European instrument regulating divorce marks the end of a Union-wide international family law construction. Despite this recoil, the Member States will remain together: for better or for worse.