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Property relations of international couples in europe: the interaction between unifying and harmonizing instruments

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Gliederung ohne Auspunktierungen und im Kleindruck!

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I. von Hoffmann on European Conflict of Law

In 1998, Bernd von Hoffmann initiated and edited a book which was the result of a SOCRATES intensive teaching programme on 'European Conflict of Laws'.[1] This book was one of the first which addressed the consequences of the by then new competence of the European Commission to legislate in civil matters with cross-border implications. The book contains contributions on the Europeanization of Private International Law and the Relevance of European Community Law in this respect (both by von Hoffmann). Following the introductory part the developments in the

1 B. von Hoffmann (ed.), European Private International Law, Ars Aequi Libri–Nijmegen 1998.

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field of international contract law and international tort law were analyzed (Dutoit, Boele-Woelki and Posch) and, finally, aspects of International Civil Procedure were explored, such as the Brussels Jurisdiction and Enforcement Convention (Salerno), the European Convention on the Service of Judicial and Extrajudicial Documents (Kaye) and the Law of Insolvency in the European Union (Bogdan).

Since the publication of the book the European landscape concerning all kinds of cross-border relationships has completely changed. Not only has the number of Regulations containing rules on jurisdiction, applicable law, recognition and enforcement increased enormously,[2] but also the speed with which the communitarian legislator adopts new rules is remarkable.[3] We are in the midst of a Union-wide private international law codification.

1. International Family Law Catches up

The table of contents of the book by Bernd von Hoffmann indicates which issues were at the forefront of the scholarly debate some thirteen years ago. At that time nobody raised questions about the future of international family relationships in Europe. International family law within the European context was hardly to be seen on the horizon.

Today, the picture is totally different. Three Regulations were adopted in 2003 (Brussels IIbis[4]), in 2008 (Maintenance Regulation[5]) and in 2010 (Rome III[6]). Three Proposals for a Regulation are currently under discussion: since 2009 the Proposal on jurisdiction, applicable law and the recognition and enforcement of decisions and authentic instruments in matters of succession and the creation of a European Certificate of Succession and since 2011 two Proposals regarding jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes and regarding the property consequences of registered partnerships. In addition, a Green Paper issued in 2010 on less bureaucracy for citizens[7]

2 In chronological order the following Regulations were adopted: Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings; Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters; Regulation (EC) No. 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters; Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for Uncontested Claims; Regulation (EC) No. 1896/2006 of 12 December 2006 Creating a European Order for Payment Procedure; Regulation (EC) No. 861/2007 of 11 July 2007 establishing a European Small Claims Procedure; Regulation (EC) No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000; Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations; Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

3 See C. González Beilfuss, The Unification of Private International Law in Europe: a Success Story?, in: K. Boele-Woelki/J. Miles/J.M. Scherpe (eds), The Future of Family Property in Europe, European Family Law No. 29, Intersentia- Antwerp 2011, 327-228.

4 Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000.

5 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.

6 Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

7 COM(2010) 747 final.

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explores the possibility to regulate the free movement of public documents and the recognition of the effects of civil status records.

2. The Parties' Autonomy to Designate a Law other than National Law

In my contribution to the aforementioned book I asked the question how the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law could be applied to international contracts.[8] My conclusion was:

> "Unlike a judge, an arbitrator is not hampered by conflict rules such as those of the EC Contracts Convention, which tend to 'nationalize' international contracts and make it impossible to apply autonomous rules, such as the Principles, to the contract. With regard to the objective rule stipulated in art. 4 of the EC Contracts Convention this is the incontrovertible truth. Reference to the Principles by the parties to the contract can however be regarded as a choice of law, with the consequence that even the mandatory provisions of the objectively applicable law may be waived."

In this contribution the extent of the parties' autonomy to select the applicable law as the law governing their relationship will be revisited. However, the focus will be different.[9] This time the property relations between spouses with cross-border implications will be examined. Also here the question arises whether the parties may choose a law other than national substantive law. First, the new efforts that are aimed at unifying and harmonizing matrimonial property law will be analyzed. Their possible interaction should also be investigated.

II. Family Property Relations in Europe

In Europe, property relations of (international) couples are addressed in both unifying and harmonizing instruments. Unification and harmonization indicate different developments, objectives and results. Regrettably, however, for a few this distinction is still difficult to comprehend.[10]

Generally, the international *unification* of law is conceived of as the process of providing identical rules for different countries so that the same solution applies everywhere, in Argentina and Germany, in the United Kingdom and Russia, if any difficulty concerning a given relationship happens to arise.[11] In contrast, the *harmonization* of the law is less far-reaching. Similar rules indicate that the laws of the legal systems in a specific area are in harmony with each other. The differences are reduced to a minimum and are less pronounced.

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8 K. Boele-Woelki, European and Unidroit Principles of Contract Law, in: B. von Hoffmann (ed), op.cit. (note 2) 67-85 (84-85).

9 See for a 'follow-up': K. Boele-Woelki, Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws, Pocketbooks of the Hague Academy of International Law, 2010 and K. Boele-Woelki, When to say 'yes' and when to say 'no' to the parties' choice of the applicable law in international contracts, Liber amicorum Ingeborg Schwenzer, 2011 (in press).

10 See e.g. Recital 21 of the Commission's Proposal for a Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2011) 126/2): "Where no applicable law is chosen, and with a view to reconciling predictability and legal certainty with consideration of the life actually lived by the couple, this Regulation must introduce harmonised conflict-of-laws rules to establish the law applicable to all the spouses' property on the basis of a scale of connecting factors." (emphasis added).

11 See R. David, The Methods of Unification, American Journal of Comparative Law 1968, 13-27 (13-14).

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Within the European context various instruments are used to achieve the unification and the harmonization of the law, such as Conventions, Regulations, Directives, Model Laws, Principles or Rules.[12]

A significant distinction for our perspective concerns the unification of private international law, on the one hand, and the unification and harmonization of substantive rules on the other. All three processes are apparent in the field of matrimonial property law, where the Hague Conference on Private International Law, the Union, individual Member States and the Commission on European Family Law (CEFL) are the main actors. Their rules will be briefly analysed and compared.

1. Unification of Private International Law

Two instruments are aimed at unifying private international law rules as regards property relations between spouses. The first instrument is a convention which was drafted almost 35 years ago. The other two instruments are still in their infancy. They will not require any involvement by national parliaments since they will be adopted in the form of a Regulation.

a) The Hague Convention on the Law Applicable to Matrimonial Property Regimes

France, Luxembourg and the Netherlands are the only three contracting states of the Hague Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes. Only in 1992 did the Convention enter into force.[13] In terms of the number of ratifications the Convention is unsuccessful; however, at least in the Netherlands, it functions well.[14] The Convention is a good example of how the drafters struggled to find a balance between the competing connecting factors of nationality and habitual residence. The result is a difficult compromise which requires detailed schematic diagrams in order to find the applicable law. It is very complicated.

As far as a choice of the law by the spouses is concerned the Hague Convention introduced, for the first time, party autonomy. The rules make a distinction between the spouses' choice before the marriage and during the marriage. According to Article 3 the spouses may designate (1) the law of any State of which either spouse is a national at the time of designation; (2) the law of the State in which either spouse has his/her habitual residence at the time of designation; or (3) the law of the first State where one of the spouses establishes a new habitual residence after marriage. During the marriage the spouses' designation of the applicable law is restricted to (1) the law of any State of which either spouse is a national at the time of designation; or
(2) the law of the State in which either spouse has his/her habitual residence at the time of designation. The choice of law before and during the marriage applies to the whole of the couple's property. Nonetheless, the spouses can make a specific choice

12 See K. Boele-Woelki, op. cit. (note 10), 55-62, 72-75.
13 Austria and Portugal did sign the Convention.
14 See L. Frohn, Tien jaar Haags Huwelijksvermogensverdrag 1978: denk aan de veranderlijkheid!, Tijdschrift voor Familie- en Jeugdrecht 2002, 154-161.

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for a law with respect to all or some of the immovables. In this case only the *lex rei sitae* may be selected.

b) The Proposal for a Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions in Matters of Matrimonial Property Regimes

The Proposal for a Union-wide Regulation of cross-border aspects of matrimonial property regimes[15] was published on 16 March 2011 together with the Proposal for a Regulation of the property consequences of registered partnerships.[16] Article 16 of the Proposal for the Regulation on matrimonial property regimes allows the spouses to choose the law which is applicable to their matrimonial property regime. They may designate: 1) the law of the State of the habitual common residence of the spouses or future spouses; (2) the law of the State of habitual residence of one of the spouses at the time of designation; or (3) the law of the State of which one of the spouses or future spouses is a national at the time the choice is made. The spouses' choice of law shall apply to all the couple's property. *Dépeçage* in favour of the spouses' immovables is not possible.

c) The Proposal for a Regulation on Jurisdiction, Applicable Law and the Recognition and Enforcement of Decisions Regarding the Property Consequences of Registered Partnerships

Since only 15 Member States have introduced institutions into their national law which provide legal recognition of same-sex relationships, the property relations of these couples will be addressed in a separate Regulation.[17] Therefore, it is to be expected that this Regulation will be adopted in the form of an enhanced cooperation procedure.[18]

The Proposal does not allow a choice of the applicable law by the registered partners. Article 15 determines that the property consequences of registered partnerships should be governed by the law of the State of registration. This conflict of law rule is in line with the national laws of those Member States which have introduced a legal framework for same-sex and different-sex couples. The Proposal follows their approach by denying partners the option of choosing any law other than that of the State of registration, even though they may be entitled to conclude agreements between themselves.

d) Comparison: Which Law may International Couples Choose?

The comparison of the choice of law rules of the Hague Convention and the Proposal for a Regulation on matrimonial property reveals that the possibilities of the

15 COM(2011) 126/2.
16 COM(2011) 127/2.
17 COM(2011) 127/2.
18 Rome III constitutes the first enhanced cooperation Regulation. See K. Boele-Woelki, For better or for worse: The Europeanization of international divorce law, Yearbook of Private International Law 2010 (in press).

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spouses who have different nationalities or who have their habitual residences in different countries under both instruments are almost identical although the options are listed in a different order. Only under the Convention may the spouses determine that immovables are governed by the law where they are situated. Under the Proposal the choice may be made at any moment, at the time of the marriage or during the course of the marriage, whereas under the conventional regime the options differ depending on when the designation of the applicable law takes place. Notably, both instruments require that the spouses make a choice in favour of the law of a State. In contrast, according to the respective Proposal for a Regulation registered partners will not be given any possibility to determine the applicable law governing their property relations.

2. Unification and Harmonization of Substantive Law

Regarding substantive law two instruments are of relevance. First, a bilateral agreement between two Member States and second the Principles of the Commission on European Family Law which are in the process of being drafted. In respect of the question as to whether a law other than national substantive law may be chosen by the spouses, these two instruments may play a significant role.

a) The Franco-German Agreement on the Optional Community of Accrued Gains

The bilateral Franco-German Agreement of February 2010[19] is primarily aimed at unifying substantive law. It introduces the community of accrued gains (*Wahl-Zugewinngemeinschaft/Le régime matrimonial optionnel de la participation aux acquêts*) as an optional matrimonial property regime.

Under the Agreement couples whose matrimonial property relations – according to German or French conflict of law rules – are governed by either German or French law may also choose the special, optional matrimonial property regime.[20] As a result, the Agreement is not limited to French or German spouses or to mixed French-Ger-

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19 Abkommen zwischen der Bundesrepublik Deutschland und der Französischen Republik über den Güterstand der Wahl-Zugewinngemeinschaft/Accord entre la République fédérale d'Allemagne et la République française instituant un régime matrimonial optionnel de la participation aux acquêts. The agreement is not yet in force. In Germany the *Bundesregierung* sent the *Entwurf eines Gesetzes zu dem Abkommen vom 4. Februar 2010 zwischen der Bundesrepublik Deutschland und der Französischen Republik über den Güterstand der Wahl-Zugewinngemeinschaft* to the *Bundesrat* on 4 February 2011 (*Drucksache* 67/11, www.bmj.de). The optional property regime will be incorporated into the German Civil Code as a new Chapter 4 of Section 1519, following the existing matrimonial property regimes. The German legislator intends to open the new regime to registered partners. See E. Becker, The Franco-German agreement on an elective 'community of accrued gains' matrimonial property regime, Directorate-General for Internal Policies, Policy Department C: Citizen's Rights and Constitutional Affairs (www.europarl.europa.eu/studies). In France the bill for ratification of the Agreement has been submitted to the French *Conseil des ministres* on 23 March 2011 (www.gouvernement.fr/gouvernement/accord-avec-l-allemagne-instituant-un-regime-matrimonial-optionnel-de-la-participation).

20 See A. Fötschl, The Common Optional Matrimonial Property Regime of Germany and France – Epoch-Making in the Unification of Law, Yearbook of Private International Law 2009, 395-404, also published in the European Review of Private Law 2010, 881-889. See also M. Braeuer, Der neue deutsch-französische Wahlgüterstand, Forum Familienrecht 2010, 113-115.

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man couples, but covers all spouses irrespective of their nationality who, according to the applicable choice of law in a concerned State, are free to choose French or German law as being applicable to their matrimonial property relations, given the spouses' or one of the spouse's connection to France or Germany.[21]

Although the Agreement primarily establishes a new matrimonial property regime to be implemented in the national laws of both France and Germany, it also has a private international law dimension. Based upon the spouses' choice which is only possible if, according to the conflict of law rules, their property relations are governed by French or German law, the optional Franco-German regime is applicable.[22]

Interestingly enough, the Agreement does not exclude other European Union Member States from becoming parties to it, once it has been ratified by France and Germany. Article 21 of the Agreement determines that due to the growing mobility of persons within the European Union it is desirable that other Member States may accede to the Agreement once it has entered into force. In that case the Agreement may be translated into the official language of the acceding Member State.[23]

How did the European Commission receive this Agreement? Is the Agreement only intended as a substantive law European regime? Is the private international law dimension considered to be problematic from the point of view of legislative competence? Or is the competence shared between the EU and the Member States or only with the Member States? These questions will be explored under III. 2.

b) The Principles of European Family Law regarding Property Relations between Spouses

After having completed the Principles of European Family Law regarding Divorce and Maintenance between Former Spouses (2004) and the Principles of European Family Law regarding Parental Responsibilities (2007), the Commission on European Family Law (CEFL) is currently in the process of drafting Principles regarding Property Relations between Spouses.[24] The work will be finalized no earlier than 2013.

In drafting these Principles, the most crucial question for the CEFL is whether the Principles should focus on only one European matrimonial property regime or whether Principles should also be drafted on an alternative matrimonial property regime. The answer depends on the following considerations:

First, six different systems can be distinguished within Europe. Roughly speaking, it is possible to divide these systems into two main systems: A community system and a separation system.[25] Both systems might adopt some elements from one another

21 See Article 1 concerning the scope of application of the Agreement.

22 See K. Boele-Woelki/M. Jänterä-Jareborg, Initial results of the CEFL in the field of property relations between spouses, in: K. Boele-Woelki/J. Miles/J.M. Scherpe (eds), The Future of Family Property in Europe, European Family Law No. 29, Intersentia- Antwerp 2011, 47-62.

23 Article 22 of the Agreement.

24 The couples' property relations in other formalized relationships such as registered partnerships and civil unions are not dealt with.

25 See W. Pintens, Matrimonial Property Law in Europe, in: K. Boele-Woelki/J. Miles/J.M. Scherpe (eds), The Future of Family Property in Europe, European Family Law No. 29, Intersentia- Antwerp 2011,19-45.

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whereby acquisitions acquired during the marriage play an important role. In doing so, it is possible to draft a community in acquisitions regime and a participation in acquisitions regime.

Second, it is self-evident that elements of all systems cannot be merged into one single matrimonial property regime. In some systems, a community of property between the spouses automatically takes effect at the moment of concluding the marriage, whereas in other systems no community of property will ever arise by operation of law (ex lege): the property of each spouse is treated as the owner spouse's personal/separate property. Elsewhere, a community of property may only come into existence at a later point in time: deferred to the moment of the dissolution of the marriage or the property regime.

Third, reducing the number of systems to only two might show that harmonisation of the law is possible within these two systems. Such a result – and the resulting simplicity compared to the alternative – might be regarded as a major achievement.[26]

Fourth, if Principles for two regimes are drafted it should be justified which of the two should be considered as the default regime. Consequently, the other will then function as an optional regime which the spouses may choose in their marital property agreement.[27]

III. The Interaction between the Various Instruments

The various instruments and initiatives presented above raise questions about the interaction between the unification and harmonisation of substantive law, on the one side, and conflict of law rules on the other. In this context the availability and applicability of a European Matrimonial Property Regime constitute the most challenging questions.

1. Towards a European Matrimonial Property Regime?

The introduction of a European Matrimonial Property Regime was proffered more than a decade ago. Already in 1995[28] and, later, in 2001[29] it had been proposed to draft a Treaty consisting of a uniform law regarding an optional international marital contract. The idea was that, at the moment of entering into a marriage, the spouses should be allowed to choose this regime like any other normal regime.

More specifically, it has been proposed that the choice for an optional *Matrimonium Europaeum* should regulate its own scope of application and that it should only be applicable subject to the choice of the parties (an opt-in).[30]

In the course of the preparation of the Proposal for the Regulation on matrimonial property regimes this idea has also been submitted. The Green Paper on Conflict of

26 See K. Boele-Woelki/M. Jänterä-Jareborg, op. cit. (note 23) 47-62.
27 This issue will also be addressed in the CEFL Principles.
28 A. Agell, The Division of Property upon Divorce from a European Perspective, in: Liber amicorum Marie-Therese Meulders-Klein: Droit compare des personnes et de la famille, 1998, 1-20 (18-20).
29 A. Verbeke, Perspectives for an International Marital Contract, Maastricht Journal of European and Comparative Law 2001, 189-200.
30 See N. Dethloff, Die Europäische Ehe, Zeitschrift für das Standesamtswesen 2006, 253-260 (255).

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Laws in Matters Concerning Matrimonial Property Regimes Including the Question of Jurisdiction and Mutual Recognition published in 2006[31] was based upon an extensive comparative study in the then 15 Member States. This study,[32] which also made a comparison of domestic matrimonial property systems, proposed a subsidiary European Matrimonial Property Regime which should be made available in all Member States.

Unexpectedly, the Green Paper does not contain questions about such an optional regime. Surprisingly, however, in 2009 the European Commission requested an impact assessment on Community instruments on the rights of property arising out of matrimonial property regimes and the property of unmarried couples,[33] which mainly focuses on the possibility of drafting an optional uniform European matrimonial property regime.[34] A draft of such a regime has recently been submitted by a group of European notaries.[35] However, in the recent documents and communications of the European Commission no reference has been made to this proposal.

Since, to date, no European Matrimonial Property Regime exists, neither the current nor the proposed conflict of law rules provide for the choice of such an optional regime. Only the law of a state can govern matrimonial property relationships. It is however interesting to take a closer look at how the European Commission perceives the current initiatives to unify and harmonize the substantive law rules.

2. Bringing Clarity to Property Rights for International Couples: Three Approaches

In its Communication of 16 March 2011 about bringing clarity to property rights for international couples[36] the European Commission acknowledges the fact that both the national substantive law rules and the conflict of law rules in the field of the property rights of international couples differ greatly. Given these differences the Commission indicates three approaches that could be envisaged at the European level:

1. The Member States find solutions within the framework of bilateral agreements;

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31 COM 2006/400, 17 July 2006.

32 TMC Asser Institute/Département de droit international UCL, Etude sur les régimes matrimoniaux des couples maries et sur le patrimoine des couples non maries dans le droit international privé et le droit interne des états membres de l'Union Européenne effectuée à la demande de la Commission Européenne Direction générale Justice et Affaires intérieures Unité A3 Coopération judiciaire en matière civile, JAI/A3/2001/03, 181.

33 Task specifications for the assignment were issued by Direction E: Justice.

34 The contractor was asked to: (1) assess the feasibility of such a uniform European optional regime; (2) analyse the added value, advantages and problems of such a European optional regime and its certificate; (3) assess what could be the impact of such measures for citizens, stakeholders and Member States, including obstacles and advantages; (4) assess the main difficulties of this proposal and (4) assess – if possible – whether there could be a relevant impact on the activity of stakeholders and on taxation.

35 F. Salerno Cardillo (rapporteur), Propositions pour un contrat de mariage "Européen". The proposal contains the essential elements (choix du régime matrimonial, loi applicable au régimes matrimonial, propriété des biens, pouvoirs des époux, inventaire – preuves et présomptions, dettes des époux, modification du régime, effets, publicité, opposabilité aux tiers, clauses particulaires) of a marriage contract in which the spouses have designated the applicable (national) law governing their matrimonial property or in which it is stated which law (objectively) is to be applied.

36 COM(2011) 125/3.

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2. The substantive law governing the property consequences of marriage and registered partnerships are harmonized;
3. The respective private international law rules are unified.

These three approaches should offer sufficient legal security to couples who have decided to exercise their right to free movement. Preferably, all three are to be realized.

The Franco-German Agreement is an example of the *first* approach. Interestingly enough, the European Commission considers it possible that other Member States accede to this Agreement. Since this bilateral Agreement is explicitly mentioned as one of the possibilities to increase legal certainty, it 'encourages' Member States to make use of and/or to accede to a bilateral Agreement which in this way becomes a multilateral Agreement/Convention. However, even if this would happen – the unifying substantive Agreement can – according to the Commission's view – neither deal with all the practical problems that arise nor, consequently, provide a comprehensive European response. Indeed, the rules of the Franco-German Agreement are only applicable if the spouses have selected the regime of the Agreement. If they have not determined the applicable law, objective conflict of law rules are to be consulted. These conflict of law rules can only be unified through the ratification of a Convention or the adoption of a Regulation. The latter constitutes the *third* approach.

The *second* approach which consists of the harmonization of substantive law cannot – according to the European Commission's Communication – be pursued by the Commission since the European Treaty does not provide any competence for the Union to legislate in this area. Substantive family law falls within the competence of the Member States. Therefore, the European Commission does not venture to embark on any legislative measures in this respect.

In contrast the *third* approach is considered as paving the way forward at this moment in time. In cross-border matters the European Union can adopt rules and the abovementioned Proposals for two Regulations illustrate how this process might develop.

IV. New Roads, New Opportunities

In the discussion about the interaction between the unifying and harmonizing instruments in the field of property relations between spouses the most obvious next step is the establishment of a European Matrimonial Property Regime.

In particular, the Franco-German Agreement which the European Commission considers as one of the possible means to reduce legal uncertainty for international couples triggers this idea. For various reasons the Agreement is of significant importance in the discussion about the possibility for spouses to select a unified substantive law as far as France and Germany are concerned. The Agreement contains substantive law rules; it establishes a new property regime which is acceptable in both France and Germany; the territorial scope will be enlarged if other Member States ratify the Agreement and its rules are applicable upon the spouses' choice.

If Member States may agree on such content they may consider different roads since the European Commission has opened the door to several paths which might be taken.

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To begin with, a European Matrimonial Property Regime might be established in a Convention by all Member States. Instead of making the application of the uniform substantive rules dependent upon the spouses' choice (an opt-in), they could also agree on an 'opt-out' system. If the (bi-)(multi-)lateral Agreement/Convention containing uniform substantive rules were to be applicable automatically in clearly prescribed situations the 'opt-out' approach would have the potential to set aside domestic substantive law unless the parties were to agree to the contrary.[37] The adoption of such a Convention could attain a similar importance and reputation as the CISG.[38] More importantly, (all) Member States could agree on a matrimonial property regime which is different to the one adopted in the Franco-German Agreement.

Taking into account that most of the Member States allow spouses to choose the law which is applicable to their matrimonial property regime and that pre- and post-marital contracts are permitted,[39] it might therefore be an attractive proposition to include a European Matrimonial Property Regime in the list of laws that the spouses may choose in their marital property agreement. At least such incorporation should be classified as a *materiellrechtliche Verweisung*. Whether the choice of a European Matrimonial Property Regime would be recognised as a *kollisionsrechtliche Verweisung* is – of course – a decision to be taken by the respective choice of law rules.

If the community of accrued gains as established in the Franco-German Agreement can be chosen as the law governing the spouses' property relations a European Matrimonial Property Regime should also be eligible as the chosen *lex matrimonio propietad.* In view of the positive approach of the European Commission towards new initiatives by Member States to unify substantive law the CEFL Principles on property relations between spouses might provide a suitable model.

37 See K. Boele-Woelki, op.cit. (note10), 134.

38 See N. Dethloff, Arguments for the Unification and Harmonisation of Family Law in Europe, in: K. Boele-Woelki (ed), Perspectives for the Unification and Harmonisation of Family Law in Europe, European Family Law Series no. 4, 2002, 37-64 (54).

39 See for the discussion in England & Wales after the Supreme Court decision of 20 October 2010, [2010] UKSC 42 in Radmacher v. Granatino: A. Sanders, Private Autonomy and Marital Property Agreements, International and Comparative Law Quarterly 2010, 571-603.